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In The

Supreme Court of the United States

October Term, 1991

WALTER FULLER AIRCRAFT SALES, INC.,

Petitioner,

versus

FAYSOUND LIMITED,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does an appellant satisfy Fed. R. App. P. 3(c) by filing a notice of appeal which designates the adverse judgment of the trial court as the "judgment appealed from," or must an appellant designate a subsequent non-adverse order denying another party's motion to amend the judgment?

2. Does Fed. R. App. P. 4(a)(6), effective December 1, 1991, which provides relief to parties not receiving notice of orders, afford relief to Petitioner by reason of rulings obtained at earlier stages in this proceeding?

3. Does a district court's divestiture of title to property of a party establish the conditions for an appeal under *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848), despite the later issuance of stays?

LIST OF PARTIES

The list of parties to the proceedings below were the Petitioner Walter Fuller Aircraft Sales, Inc., Faysound Limited, and Falcon Jet Corporation.

Petitioner Walter Fuller Aircraft Sales is neither a parent nor a subsidiary corporation.

It is Petitioner's belief that Falcon Jet Corporation has no interest in the outcome of the petition.

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WALTER FULLER AIRCRAFT SALES, INC.,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter Fuller Aircraft Sales, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion entered below by the United States Court of Appeals for the Eighth Circuit on August 1, 1991.

OPINIONS BELOW

This is a petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review a decision of that court. The decision is reported at 940 F.2d 339 and is reprinted in the Appendix at 1-13. The opinion

of the district court is reported at 748 F. Supp. 1365 and is reprinted in the Appendix at 16-37.

JURISDICTION

The case below was filed in the Eastern District of Arkansas on the assertion by Plaintiff Faysound Limited of diversity of citizenship under 28 U.S.C. § 1332(a) (Supp. 1991). The opinion of the court of appeals was entered on August 1, 1991. Walter Fuller Aircraft Sales, Inc.'s timely petition for rehearing and suggestion of rehearing *en banc* were denied on September 27, 1991. This petition has been filed within 90 days of that date. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (Supp. 1991).

STATUTES AND RULES INVOLVED

Rule 3(c) of the Federal Rules of Appellate Procedure provides:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides:

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within seven days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

STATEMENT OF THE CASE

This petition seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit. The decision is reported as *Faysound Ltd. v. Falcon Jet Corp.*, 940 F.2d 339 (8th Cir. 1991) (*"Faysound Ltd."*).

The underlying dispute in *Faysound Ltd.* concerned the ownership of a Falcon Jet. On October 29, 1990, the district court entered a judgment divesting Petitioner Walter Fuller Aircraft Sales, Inc. ("Fuller"), a defendant in the district court, of title and vesting title to the jet in Faysound Limited ("Faysound"), the plaintiff. Fuller noticed an appeal of this judgment on November 7, 1990. On November 9, 1990, Falcon Jet Corporation, a separate defendant, filed a motion to amend the judgment, seeking certain costs and attorney fees from Fuller or Faysound. Fuller opposed this motion. On January 22, 1991, the district court entered an order denying this motion. Appendix 38. Fuller's counsel never received a copy of this order from the district court. *See Faysound Ltd.*, 940

F.2d at 344. No separate judgment was entered on this order.

On January 25, 1991, Fuller filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Texas, No. 391-30496-SAF-11, *In re Walter Fuller Aircraft Sales, Inc.*, automatically staying all proceedings. On March 22, 1991, the Bankruptcy Court entered an agreed order lifting the automatic stay to allow an appeal to proceed in the Eighth Circuit. The Bankruptcy Court's order identified: (1) the district court case being appealed, (2) that Fuller was the appellant, and (3) the judgment of the district court dated October 29, 1990, from which Fuller's appeal was being taken. Faysound approved the Bankruptcy Court order "as to form and agreed." Appendix 48-51.

On March 13, 1991, by letter to the Eighth Circuit, Fuller gave notice that it would proceed there with its appeal of the district court's October 29, 1990 judgment and enclosed a copy of the Bankruptcy Court's order to that effect (the "March 13 Notice"). Opposing counsel also was sent a copy of the March 13 Notice. Appendix 44-53. The Eighth Circuit then entered an order on March 18, 1991 stating "this case will proceed on a normal course unless and until this Court is advised of any order from the Bankruptcy Court for the Northern District of Texas requiring contrary actions." Appendix 39. Fuller's appeal then proceeded with both sides fully briefing the Court on the merits.

On May 16, 1991, Faysound moved to dismiss the appeal for lack of jurisdiction. Faysound contended that

under Fed. R. App. P. 4(a)(4) Fuller's November 7, 1990 notice, although timely when filed, became ineffective by the filing of Falcon Jet's November 9 motion. Fuller responded by noting that, even if the November 7 notice were premature, its March 13 Notice to the court of appeals timely fulfilled all of the requirements for an effective notice of appeal under Fed. R. App. P. 3(c).[1] Fuller also maintained that the November 7, 1990 notice was timely and effective under the doctrine of practical finality known as the "*Forgay* doctrine." This long-standing doctrine, first announced by this Court in *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848), entitles the losing party in a suit over title to property to an immediate appeal even if collateral issues remain pending in the district court.

On May 23, 1991, Fuller requested that the district court deem the entry of the January 22 order to be as of May 16, 1991, the day Fuller received notice of that order, and this motion included a new notice of appeal from the trial court's judgment of October 29, 1990. Fuller established that, because it never received a copy of the January 22, 1991 order, it had no notice that time was running

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[1] Fuller's voluntary bankruptcy petition was filed on January 25, 1991 and automatically stayed any appeal. 11 U.S.C. § 362 (1985); *Freeman v. Commissioner*, 799 F.2d 1091 (5th Cir. 1986). Due to the bankruptcy filing, the time for noticing an appeal did not expire until April 11, 1991, thirty days after the Bankruptcy Court's March 12, 1991 order lifting the stay. 11 U.S.C. § 108(c) (1985); *see Collier on Bankruptcy* ¶ 108.04 (15th ed. 1991). The March 13 Notice therefore was timely filed under Fed. R. App. P. 4. The timeliness of the March 13 Notice was assumed to be correct by the Eighth Circuit. *Faysound Ltd.*, 940 F.2d at 342.

on Rule 4(a)(4)'s requirement that a second notice of appeal was necessary. Although this motion was made pursuant to Fed. R. Civ. P. 60(b), Fuller noted that Fed. R. App. P. 4(a) had been modified, effective December 1, 1991, to allow parties additional time to notice an appeal where they had not received notification of a district court's order. Appendix 54-58. Fuller also made this request in the Eighth Circuit. *See Faysound Ltd.*, 940 F.2d at 344.[2]

On August 1, 1991, the Eighth Circuit dismissed Fuller's appeal for lack of jurisdiction. The court of appeals concluded that Fuller's original November 7, 1990 notice of appeal was nullified by the later filing of Falcon Jet's motion to amend. The court held that the March 13 Notice was deficient as a notice of appeal because Fuller identified the district court's October 29, 1990 judgment as "the judgment" from which Fuller's appeal lies. The Eighth Circuit held that Fuller instead should have designated the district court's January 22, 1991 order denying Falcon Jet's motion to amend as "the judgment" from which it was appealing. The court of appeals concluded that this mistake prevented the March 13 Notice from serving as an effective notice of appeal. *Faysound Ltd.*, 940 F.2d at 342. The Eighth Circuit further held that the original November 7, 1990 notice was ineffective under the *Forgay* doctrine because stays of execution issued by the district court prevented an immediate

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[2] Fuller filed a copy of the Rule 60(b) motion in the Eighth Circuit as an exhibit to its Response to Faysound's Motion to Dismiss Appeal for Lack of Jurisdiction.

transfer of title to the airplane, precluding a proper *Forgay* appeal. *Id.* at 344.

Finally, the Eighth Circuit held that it could not deem the date of entry of the January 22, 1991 order to be May 16, 1991 – the date Fuller received notice of the order – because Rule 77(d) of the Federal Rules of Civil Procedure, as it existed at that time, stated that lack of notice of the entry of an order would not affect time to appeal. Although the power to extend time on these grounds was granted to the court in (new) Fed. R. App. P. 4(a)(6), the Eighth Circuit reasoned that prior to the effective date, no such power existed. *Faysound Ltd.*, 940 F.2d at 344.

On August 29, 1991, the district court held that it *would* grant Fuller's motion, deeming the date of entry of the January 22 order to be May 16, 1991, but that it had no jurisdiction to do so as the case was pending in the Eighth Circuit. Appendix 42. Although Fuller requested a remand on this ground, the Eighth Circuit refused. Appendix 40-41.

On September 27, 1991, the Eighth Circuit denied Fuller's Petition for Rehearing and Suggestion of Rehearing En Banc. Appendix 43.

REASONS FOR GRANTING THE WRIT

According to this Court, if a party intends to appeal a judgment, it should designate *that* judgment, not an order refusing modification of that judgment, in its notice of appeal. The Eighth Circuit's decision, mandating that an

appellant must designate an order denying modification of a judgment rather than the judgment itself, will create a contrary rule for districts in the Eighth Circuit and will cause confusion among all potential appellants and courts of appeals in determining what properly must be designated in a notice of appeal. Resolving this conflict is of crucial importance as this issue will arise in every appeal where a party has filed and the court has denied a post-judgment motion. Indeed, because the Eighth Circuit "has so far departed from the accepted and usual course of judicial proceedings," this Court should summarily reverse the decision below and remand this case for a decision on the merits of the appeal. Sup. Ct. R. 10.1(a).

In addition, this Court should summarily reverse the decision below and remand this case to the Eighth Circuit with instructions to apply Fed. R. App. P. 4(a)(6), which allows a district court to "reopen" the time to appeal where an appellant did not receive notification of an order or judgment. The Eighth Circuit refused to grant this relief because Rule 4(a)(6) did not become effective until December 1, 1991. This date has now passed, the rule is now effective, and this Court has mandated that the rule applies to *all* pending proceedings. Order of April 30, 1991, ___ U.S. ___, 111 S. Ct. 1011 (1991). Therefore under the rule, the district court must be allowed to enter its order granting Fuller the relief now available under Fed. R. App. P. 4(a)(6) and Fed. R. Civ. P. 77(d) and effectuating Fuller's curative notice of appeal. Because Rule 4(a)(6) was adopted only as of December 1, 1991, this is the first opportunity for Fuller to seek the relief now available to it under the rules.

Finally, the Eighth Circuit has created confusion and conflict with other courts of appeals concerning the proper application of this Court's decision in *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848). As commentators have noted, *Forgay* is a difficult decision to apply; the Eighth Circuit's opinion further jeopardizes a logical and consistent application. Fuller urges this Court to dispel the current confusion and conflict over the doctrine evident in the opinion of the Eighth Circuit.

I. The Eighth Circuit's Holding That a Notice of Appeal of a Judgment Must Designate a Denial of a Motion to Amend That Judgment Conflicts With Decisions of This Court, Decisions of Other Appellate Courts, and the Federal Rules of Appellate Procedure.

Rule 3(c) of the Federal Rules of Appellate Procedure states in part that "[t]he notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal." The Eighth Circuit found that Fuller's March 13 Notice to the court of appeals was an insufficient notice of appeal because it identified the original judgment of the district court – the judgment adverse to Fuller – instead of identifying the non-adverse order denying another party's motion to amend that judgment. This holding is in conflict with settled Supreme Court decisions and the Federal Rules of Appellate Procedure.

This Court has consistently held that if a party intends to appeal a judgment, it should designate *that* judgment, not an order refusing modification of that judgment, in its notice of appeal. *See Foman v. Davis*, 371 U.S. 178, 181 (1962). This Court should grant certiorari and reverse the decision below both as an exercise of its supervisory function to correct important and egregious errors in the application of federal procedure and to undo the inevitable confusion the Eighth Circuit's decision will cause among the lower courts.

A. The Conflict.

Rule 3(c) allows a party to designate "the judgment, order or part thereof" that the party intends to appeal, and a litigant may appeal any part of a judgment. *See Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 141 (1946). Fuller had absolutely no interest in appealing the January 22, 1991 denial of Falcon Jet's motion to amend. That denial was not adverse to Fuller, as Fuller had opposed Falcon Jet's motion. Fuller instead appealed that part of the judgment which awarded the Falcon jet to Faysound. This award was set forth in the October 29, 1990 judgment; hence, Fuller properly noticed *that* judgment.

Fuller's designation hardly can be considered a mistake. In order to appeal the October 29, 1990 judgment, Fuller was obligated to notice *that* judgment, and *not* the denial of someone else's motion to amend that judgment, as the court of appeals held. An appeal from a denial of a motion to amend a judgment is not the same as an appeal from the judgment itself; if a party intends to appeal a

judgment, it should designate that judgment in a notice of appeal. *Foman*, 371 U.S. at 181 (1962).[3] As this Court has stated in an analogous circumstance:

> [a] refusal to modify the original order, however, requires the appeal to be from the original order, even though time [to appeal] is counted from the later order refusing to modify the original. *An appeal does not lie from the denial of a petition for rehearing.*

Pfister v. Northern Illinois Fin. Corp., 317 U.S. 144, 149-50 (1942) (emphasis added). The same clearly must be true of a denial of a motion completely unrelated to the merits of the judgment actually being appealed.

This result is *a fortiori* under *Foman*, where this Court held that appellate courts may treat a mistakenly-designated appeal from the denial of a post-judgment motion as an appeal from the original judgment when the intention to appeal the original judgment is manifest. *Foman*, 371 U.S. at 181. The Eighth Circuit has rejected this holding. In the Eighth Circuit's view, what this Court has held is incorrect but excusable is now correct, and what this Court has held to be correct is now incorrect and inexcusable.[4]

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[3] The First Circuit recently reemphasized that a notice of appeal designating the denial of a Rule 59 motion is *not* the equivalent of an appeal from the underlying judgment itself. *Mariani-Giron v. Acevedo-Ruiz*, 945 F.2d 1, 3 (1st Cir. 1991).

[4] This is made starkly clear by a proposed amendment to Fed. R. App. P. 4(a)(4) which provides that where timely notice of appeal of a judgment is followed by another party's motion

(Continued on following page)

The effect of the court of appeals' decision below is to *require* Fuller and other similarly situated appellants to designate the wrong "judgment." Thus the opinion below is an extreme departure from settled law. How far the Eighth Circuit has strayed from established law is illustrated by *Foman*. In *Foman*, this Court addressed the same provision of Fed. R. App. P. 3(c) that is at issue here. Foman was a plaintiff whose complaint was dismissed. After dismissal, he filed a motion in the district court to vacate the judgment. While that motion was pending, he filed a notice of appeal from the dismissal. After the district court denied the motion to vacate, Foman filed a second notice of appeal which designated the order denying the motion to vacate, not the original judgment. The court of appeals concluded that the first notice of appeal was premature because of Foman's pending motion and that the second notice was inadequate because it failed to designate the original order dismissing the case. This Court reversed that finding, stating that because Foman's intention to appeal the original judgment was "manifest," the court of appeals should have treated the second notice as "an effective, although inept, attempt to appeal

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to amend the judgment, the notice of appeal *of the original judgment* is held in abeyance until the denial of the motion to amend. No new notice of appeal designating the denial of the motion to amend must be filed. Fed. R. App. P. 4(a)(4) (Proposed August, 1991), ___ U.S. ___, 112 S. Ct. CCXIX-CCXX. Obviously, this rule assumes that the denial of the motion to amend is not the appealable judgment. If this rule were to go into effect, the Eighth Circuit's holding that an order denying a motion to amend is *the* only appealable judgment would create even greater confusion among potential appellants.

from the judgment sought to be vacated." *Id.* at 181. *See also FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. ___, 111 S. Ct. 648, 653 n.6 (1991) ("In Foman, we established that a notice of appeal that designates a post-judgment motion should be treated as noting an appeal from the final judgment when the appellant's intention to appeal the final judgment is . . . manifest. . . . ").[5]

The Eighth Circuit here has turned *Foman* on its head. Fuller intended to appeal the district court's award of the jet to Faysound. This award was made in the October 29 judgment. Fuller designated this judgment. Had Fuller designated the order denying the motion to amend, as the

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[5] This Court's decisions concerning the judgment to be appealed have been followed consistently in the appellate courts, including former decisions in the Eighth Circuit. *See McGowne v. Challenge-Cook Bros. Inc.*, 672 F.2d 652, 659 (8th Cir. 1982) (notice of appeal designating order denying new trial, but not original judgment, was "technically defective" but not fatal to appeal); *Railway Express Agency Inc. v. Epperson*, 240 F.2d 189, 192 (8th Cir. 1957) (an appeal from an order denying a motion to modify judgment is not an appeal from the judgment complained of; such a notice would not be fatal if intent to appeal from original judgment is present); *Payne v. Koehler*, 225 F.2d 103 (8th Cir.), *cert. denied*, 350 U.S. 904 (1955); *United States v. Best*, 212 F.2d 743, 744 n.1 (1st Cir. 1954) (appeal should be taken from original judgment, not from order denying the rehearing of original judgment); *Krause v. Bennett*, 887 F.2d 362, 367 n.2 (2d Cir. 1989) (notice of appeal should be taken from original judgment; notice designating appeal from denial of motions j.n.o.v. and to amend judgment was "technically inaccurate" but not fatal to appeal); *Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1545-47 (7th Cir. 1985) (denial of a Rule 59(e) motion is not appealable, but notice of appeal designating order denying amendment is not fatal if party intended to appeal original judgment).

Eighth Circuit demands, Fuller might have lost all chance of appealing the October 29, 1990 judgment and would have been allowed to appeal the October judgment only had its intention to do so been "manifest." Instead of excusing an error, the Eighth Circuit is *mandating* an error.

Underlying the Eighth Circuit's sudden departure from binding precedent is the faulty premise that an order denying a Rule 59 motion becomes the only "final judgment" that may be appealed. *Faysound Ltd.*, 940 F.2d at 342. This holding is simply in error. As Professor Moore has noted:

> A timely motion under Rule 59(e) to alter or amend a judgment suspends the finality of the judgment for purposes of appeal . . . If the motion is denied, the finality of the [original] judgment is restored.

6A James W. Moore et al., Moore's Federal Practice ¶ 59.15[4], at 59-310 (2d ed. 1991). In short, an order denying a motion to amend is a timing device, marking the date from which one calculates the time to notice an appeal. Ordinarily, under the current rules, when an appeal is noticed before a motion to amend is filed, a "new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion. . . . " Fed. R. App. P. 4(a)(4). But an order denying a motion to amend a judgment is not the "judgment" being appealed, unless a party wishes to appeal the denial. Fuller did not, as the denial of that motion was not adverse to Fuller. As such, the denial serves only

as the point from which the "new" appeal time is to be measured.[6]

The judgment in this case – the judgment which aggrieved Fuller and which was to be identified in a notice of appeal by Fuller – was the district court's October 29, 1990 judgment. The March 13 Notice to the Eighth Circuit may not be considered an insufficient notice of appeal on the ground that it did not designate the correct judgment. If such a decision is allowed to stand it will create enormous confusion in the lower courts. The decision below therefore should be reviewed by this Court both because of the Eighth Circuit's departure from the accepted and usual course of judicial proceedings and because of the conflict now established with *every* other court of appeals.

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[6] Moreover, the January 22, 1991 order was not appealable under old Fed. R. App. P. 4(a)(6), new Rule 4(a)(7), because under that rule a judgment may be appealed only when entered in compliance with Fed. R. Civ. P. 58. Rule 58 states, in part, that "[e]very judgment shall be set forth on a separate document." In order to meet this requirement, a separate document must be prepared which is distinct from any other document entered in the case. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978). Although this requirement may be waived for reasons of economy when both the parties and the court have treated an order as the final appealable judgment, no such waiver could have taken place here: Fuller never treated the January 22, 1991 order as the final judgment.

B. The March 13 Notice Complies With Every Requirement of Fed. R. App. P. 3(c) and the Eighth Circuit's Admonition That the Rules of Appellate Procedure are to be Applied With Uncompromising Rigidity is Incorrect.

Because the court of appeals found that the March 13 Notice to the Eighth Circuit designated the "wrong" judgment, it held that the March 13 Notice was not adequate as a notice of appeal. As set forth above, the court of appeals is simply wrong. Contrary to the Eighth Circuit's opinion, the March 13 Notice satisfies Fed. R. App. P. 3(c) and constitutes an effective notice of appeal.

Under Rule 3(c), a notice of appeal must specify the party taking the appeal, designate the judgment appealed from, and name the court to which appeal is taken. Fed. R. App. P. 3(c). The rule also unequivocally states "an appeal shall not be dismissed for informality of form or title of the notice of appeal." *Id.* The substance of the rule is satisfied, and the function of notice is met, by filing a paper indicating an intention to appeal. Fed. R. App. P. 3(c) advisory committee's note.

In discussing the prerequisites for noticing an appeal, this Court held: "[I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318-19 (1988). In *Torres*, the Supreme Court reaffirmed the "important principle," set forth earlier in *Foman v. Davis*, "that the requirements of the rules of procedure should be liberally

construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres*, 487 U.S. at 316. This Court's rulings in *Torres* and *Foman* are firmly rooted in the Federal Rules of Appellate Procedure, in which fairness and flexibility are incorporated. The rules repeatedly emphasize fairness and flexibility. Rule 3(c) explicitly states: "An appeal shall not be dismissed for informality of form or title of the notice of appeal." Fed. R. App. P. 3(c). Fed. R. App. P. 4(a)(1) permits an appeal to proceed where notice is filed in the court of appeals instead of the district court. Additionally, Fed. R. App. P. 4(a)(2) provides that a notice of appeal filed after a ruling from the district court, but before entry of judgment, is deemed to be filed after entry and on the day thereof. Rule 4(a)(5) similarly permits the district court, for good cause or excusable neglect, to extend the time for filing a notice of appeal upon motion filed not later than 30 days *after* the time for filing has expired. Fed. R. App. P. 4(a)(5). These defects are far more grievous than the alleged failure of Fuller in this case, which fits comfortably under the phrase "informality of form or title" in Rule 3(c).

Neither this Court nor the rules have changed their tradition of construing the Rules of Appellate Procedure in order to reach the merits of an appeal. Therefore, contrary to the "uncompromising rigidity" with which the Eighth Circuit construed the Rules of Appellate Procedure, this Court and the rules themselves mandate their fair and flexible construction. Rule 3(c) does *not* require a single piece of paper styled "notice of appeal." Rather, it explicitly contemplates that an appeal may be noted informally so long as it satisfies Rule 3(c). *See Torres*, 487

U.S. at 319 (Justice Scalia, concurring). Although admittedly guilty of "informality of form or title," the March 13 Notice satisfies the three content requirements of Fed. R. App. P. 3(c). Further, the March 13 Notice, filed voluntarily by Fuller, put the court and opposing counsel on notice of Fuller's intention to proceed with an appeal. The Eighth Circuit, clearly understanding Fuller's expressed intent to proceed with the appeal, immediately entered an order stating the appeal would proceed. Appendix at 39. Fuller therefore sufficiently noticed an appeal of the October 29, 1990 decision awarding title to the jet to Faysound.

II. Fed. R. App. P. 4(a)(6) Requires the District Court to Reopen the Time for Fuller to Notice an Appeal.

On December 1, 1991, an amendment to Rule 4(a) of the Federal Rules of Appellate Procedure, and a corresponding amendment to Rule 77(d) of the Federal Rules of Civil Procedure, became effective. Fed. R. App. P. 4(a)(6) now states as follows:

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the

> date of entry of the order reopening the time for appeal.[7]

The enabling statute for changes to the Federal Rules of Appellate Procedure is found in 28 U.S.C. §§ 2072-2074 (Supp. 1991). Section 2074(a) provides:

> The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

By order of April 30, 1991, this Court stated that new Rule 4(a)(6) "shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending." Order of April 30, 1991, ___ U.S. ___, 111 S. Ct. 1011 (1991).

Rule 4(a)(6) is now effective. Its application is both just and practicable. Applied here, Rule 4(a)(6) warrants a summary reversal of the judgment of the Eighth Circuit Court of Appeals and a remand to that court for further proceedings on the merits of Fuller's appeal.

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[7] Rule 77(d) states that "[l]ack of notice of the entry [of an order] by the clerk does not affect the time to appeal . . . *except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.*" (emphasis added).

This application arises from the Eighth Circuit's dismissal of Fuller's appeal on the ground that Fuller's otherwise timely notice of appeal became ineffective when co-defendant Falcon Jet Corporation filed a motion to amend the judgment. When Faysound's motion to dismiss the appeal was filed, Fuller, mindful of the pending amendment to Fed. R. App. P. 4(a)(6) and noting that amendment, moved under Fed. R. Civ. P. 60 in both the district court and the Eighth Circuit seeking the relief now available under new Fed. R. App. P. 4(a)(6), on the ground that it never received notice of the district court's January 22, 1991 order. Fuller's motion to the district court was made on May 23, 1991, within seven days of receiving notice of the January 22, 1991 order. Fuller included in this motion a new notice of appeal. Appendix 56. The district court, upon considering Fuller's Rule 60(b) motion and Faysound's opposition, entered an order on August 29, 1991 stating that the motion "would be granted." Appendix 42.[8] Fuller argued, and the district court obviously concluded, that Faysound would not be prejudiced by the reopening of the time to appeal because, prior to ever questioning the Eighth Circuit's jurisdiction, it had completed its briefing on appeal. As

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[8] At this point no jurisdiction existed in the district court. The Eighth Circuit's normal procedure in these circumstances is for the district court to indicate how it would rule on a Rule 60 question and then remand the case if the district court has indicated it would grant such a motion. *See Winter v. Cerro Gorda Conservation Bd.*, 925 F.2d 1069, 1073 (8th Cir. 1991). The court of appeals, however, denied Fuller's motion to remand the case to allow the district court to enter an order which would have had the effect of reopening the time to appeal.

stated in the Fed. R. App. P. 4(a)(6) advisory committee's note, "prejudice" is *not* found in the cost of opposing an appeal and the risk of reversal.

Although the Eighth Circuit accepted that Fuller's counsel never received notification of the January 22 order and agreed that no prejudice existed, it refused to grant relief to Fuller on the ground that the court would have this power only as of December 1, 1991, when new Fed. R. App. P. 4(a)(6) became effective. *Faysound Ltd.*, 940 F.2d at 342, 344. According to the court of appeals it was bound by old Fed. R. Civ. P. 77(d), which provided that lack of notice does not authorize a court to relieve a party of a failure to meet the appellate time limits. This Court is not, however, limited in this regard – December 1 has passed and new Rule 4(a)(6) is now effective.

Both the trial court and the court of appeals have now accepted that each of the necessary elements of new Rule 4(a)(6) is present:

- Fuller did not receive notice of the district court's January 22 order within 21 days of its entry, and

- no party would be prejudiced by allowing Fuller's appeal to proceed on the merits.

Moreover, Fuller has complied with new Rule 4(a)(6) by filing – in both the trial court and the court of appeals – motions seeking the relief available under the new rule and by filing a new notice of appeal. In other words, Fuller has anticipated and met the procedural requirements of the new Rule 4(a)(6) and has obtained the

necessary ruling from the trial court.[9] The relief sought by Fuller is, therefore, feasible – as required by 28 U.S.C. § 2074(a) (Supp. 1991) – and practicable – as required by this Court's implementing Order of April 30, 1991. The requirement of a just result is present: the merits of the appeal have been fully briefed and argued before the court of appeals. The notes of the advisory committee regarding the amendments to Rule 4(a)(6) dispel any notion of prejudice to Faysound in this situation. The Eighth Circuit expressly observed that the relief now available under Rule 4(a)(6) would "avoid the unfair result which is occurring in this case." *Faysound Ltd.*, 940 F. 2d at 344. This Court has advised that "insofar as just and practicable," new Rule 4(a)(6) should apply to all pending proceedings. In the present case it is eminently just and practicable to apply Rule 4(a)(6).

Because the district court has advised that it *would* grant Fuller's request if it had jurisdiction, and because power to grant this request now exists, Fuller requests that this Court issue a writ of certiorari and immediately remand this case with instructions to the lower courts to reopen the time for appeal.

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[9] Alternatively, it is practicable and feasible, if appropriate, to remand this proceeding to the court of appeals with direction to further remand to the trial court for the necessary findings.

III. The Eighth Circuit's Holding That the *Forgay* Doctrine did not Apply is in Conflict With Other Courts of Appeals and is Entirely Illogical.

The *Forgay* doctrine entitles a losing party in a suit over title to or possession of property to an immediate appeal of a decree of title or possession even though collateral issues may remain pending in the district court. *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848). Professor Moore has observed that this doctrine "is not always a rule of easy application." *See* 9 James W. Moore et al., Moore's Federal Practice ¶ 110.11, at 97 (2d ed. 1991). Nevertheless, the doctrine, as announced by this Court, applies wherever property rights are transferred by court decree. The doctrine, therefore, applies here. The Eighth Circuit's refusal to apply *Forgay*, on the ground that stays of execution were issued by the district court and court of appeals, departs from the *Forgay* decision and is in conflict with other courts of appeals. Such a decision will make a doctrine of difficult application only more confusing and therefore needs to be reversed.

A. The *Forgay* Decision Applies To This Case.

Because the immediate transfer of title or possession creates irreparable injury to a party divested of property rights, the *Forgay* doctrine authorizes immediate review of such a decision, even if the decree may not be "final" due to the pendency of other issues or motions unrelated to title or possession. *See e.g., Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945) (judgment setting aside lease of radio station and ordering that an accounting be had

on remand was final order appealable under *Forgay* doctrine); *Thomson v. Dean*, 74 U.S. (7 Wall.) 342 (1869) (decree which determined right to ownership of stock held to be a final order under *Forgay* doctrine, though further decree to adjust the accounts between the parties pursuant to the decree of ownership might be necessary). The doctrine turns on the fact that the court's order transfers property rights; its rationale is that the party seeking to appeal is seriously harmed when ownership is divested.

This Court restated the doctrine's procedural underpinnings in *Radio Station WOW* as follows:

> In effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled.

326 U.S. at 126.

Fuller's November 7, 1990 notice is effective under the *Forgay* doctrine. The October 29, 1990 judgment vested title in Faysound and divested Fuller's property rights. Although a collateral issue on costs and fees subsequently was raised by Falcon Jet, the October 29, 1990 judgment settled substantial rights between Faysound and Fuller. No other steps were needed for Faysound to claim immediate ownership of the airplane at issue. The decision as to title was totally independent of Falcon Jet's claim for costs and fees and unaffected by Falcon Jet's motion. Falcon Jet's post-judgment motion did not affect the appealability of the October 29, 1990 judgment under the *Forgay* doctrine. Fuller's appeal thus was entitled to

proceed when Fuller noticed the appeal of the October 29 judgment on November 7, 1990. The Eighth Circuit's jurisdiction properly was invoked at that time notwithstanding the post-judgment motion filed by Falcon Jet.

B. The Conflict.

The Eighth Circuit acknowledged the validity of *Forgay* but refused to apply it here because the district court, and then the court of appeals, issued stays of execution. According to the Eighth Circuit, because there was no threat of an immediate transfer of title, *Forgay* did not apply. *Faysound Ltd.*, 940 F.2d at 344. This position is directly contrary to the opinion of the Eleventh Circuit in its interpretation of *Forgay*, is inconsistent with the Tenth Circuit's instructions as to a *Forgay* appeal, and is illogical in light of the Eighth Circuit's previous position on the matter. *See In re Regency Woods Apartments Ltd.*, 686 F.2d 899 (11th Cir. 1982); *see also Kasishke v. Baker*, 144 F.2d 384, 386 (10th Cir.), *decision on the merits*, 146 F.2d 113 (10th Cir. 1944), *cert. denied*, 325 U.S. 856 (1945); *Minnesota & Ontario Paper Co. v. Swenson Evaporator Co.*, 281 F. 622, 625-626 (8th Cir. 1922).

Under the Eleventh Circuit analysis, application of the *Forgay* doctrine is not vitiated by the potential availability of an appellate bond to stay a judgment. In *In re Regency Woods Apartments Ltd.*, the Eleventh Circuit considered an appeal from a district court's reversal of a bankruptcy court order. The court concluded that *Forgay* did not apply because "[t]he district court has neither passed title to nor directed delivery of any property, and it has not awarded execution." *Regency Woods*, 686 F.2d at

902. The court stated that *Forgay* would apply if a subsequent court order required the delivery of property. The court also concluded that a stay issued pursuant to a supersedeas bond would have no effect on a *Forgay* appeal due to "the potential for irreparable harm that could result from an erroneous district court order that cannot be appealed before termination of the entire litigation." *Id.* at 903. In other words, a *Forgay* appeal turns on the award of title, not on the *actual* transfer of title. Indeed, the need for immediate appeal is to prevent actual transfer.

The Eighth Circuit has attempted to circumvent *Regency Woods* and its own earlier decision permitting a *Forgay* appeal[10] by drawing a meaningless distinction between the delay in transfer caused by a supersedeas bond and the delay in transfer caused by automatic court stays. However, the substance of this difference is never explained. The Eighth Circuit merely arbitrarily states that *Forgay* does not apply because "transfer of title was not imminent." *Faysound Ltd.*, 940 F.2d at 344. The court of appeals simply ignores the fact that when a supersedeas bond is filed, transfer is not imminent either. The Eighth Circuit has seized upon an illusory distinction that provides no rational basis for a difference in order to reach the wrong result.

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[10] In *Minnesota & Ontario Paper Co.*, 281 F. at 622, the appellant successfully invoked the Eighth Circuit's jurisdiction under *Forgay* while having posted a bond to supersede the award being appealed. Moreover, the Eighth Circuit acknowledges in its opinion in this case that a supersedeas bond does not affect whether *Forgay* applies. *Faysound Ltd.*, 940 F.2d at 344.

What is required under *Forgay* is that there be a "final decision" "which settles substantial rights, which makes no reservation as to its effect, and which is designed to be operative in a way affecting such rights at once or before or irrespective of the final decree. . . . " *Kasishke*, 144 F.2d at 386.[11] The October 29, 1990 judgment is exactly that type of decision. It effected an immediate transfer of title to Faysound. As a result, it is appealable as a "final decision" under the doctrine announced by *Forgay*. The Eighth Circuit's opinion thus directly conflicts with decisions in both the Tenth and Eleventh Circuits. That conflict must be resolved if the lower federal courts are to apply the *Forgay* doctrine in a logical and correct manner.

CONCLUSION

This petition for certiorari should be granted for the reasons set forth herein. The Eighth Circuit's departure from the established procedures for noticing appeals requires correction, and the first question presented here is of crucial importance to appellants in all federal civil cases. Petitioner suggests that this question is appropriate for summary disposition and that this case also may appropriately and summarily be remanded to afford Petitioner the relief now available to it under the newly effective Rule 4(a)(6). Alternatively, this Court should

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[11] This is entirely consistent with 28 U.S.C. § 1291 (Supp. 1991), which authorizes an appeal from a "final decision," not only from a judgment. *See Kasishke*, 144 F.2d at 385, discussing the predecessor statute to 28 U.S.C. § 1291.

grant this petition for certiorari as to the substantive questions presented, including the proper application of the *Forgay* doctrine.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2896EA

Faysound Limited, Appellee, v. Falcon Jet Corp. Walter Fuller Aircraft Sales, Inc., Appellant.	*	On Appeal from the United States District Court for the Eastern District of Arkansas. [TO BE PUBLISHED.]

Submitted: June 13, 1991

Filed: August 1, 1991

Before ARNOLD, Circuit Judge, HEANEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

This case is about who owns a Falcon jet. It is also about the procedural requirements for prosecuting an appeal. The District Court[1] awarded title to Faysound

[1] The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

Limited, the plaintiff. Walter Fuller Aircraft Sales, Inc., which also claims title to the plane, appealed. After Fuller's notice of appeal had been filed, Falcon Jet Corporation, the other defendant, asked the District Court to amend its judgment in this case. The District Court denied the motion. Fuller did not file another notice of appeal after the District Court's judgment thus became final. Faysound now argues that Fuller's failure to file a timely and effective notice of appeal deprives this Court of jurisdiction. Fuller disagrees, of course, and offers several reasons why we should continue on to the merits of this interesting dispute. The reasons are ingenious, but we are unconvinced. The appeal will be dismissed for lack of a final judgment supporting Fuller's notice of appeal.

I.

Faysound is a Hong Kong corporation. In 1982 it purchased a Falcon 50 jet aircraft from Falcon Jet Corporation for a little over nine million dollars. Faysound promptly leased the jet to a Philippine corporation, United Coconut Chemicals, for five years. During the term of that lease, President Ferdinand Marcos fled the Philippines, and was succeeded by Corazon Aquino. As one of her first official acts, President Aquino established the Philippine Commission on Good Government. The Commission's job was to recover assets held by President Marcos and his associates that had, in effect, been plundered from the Philippine treasury. United Coconut was suspect. One of the corporation's largest stockholders was a close friend and advisor to Marcos. The Falcon was

seized by the Commission in 1986. The writ of sequestration authorizing the seizure lapsed, however, in 1988. The Commission nonetheless continued to hold the jet, and in 1989 it sold the Falcon to Walter Fuller Aircraft Sales, Inc. Fuller flew the jet to Little Rock, Arkansas, for repairs at the Falcon Jet facility there.

Faysound then sued to recover the jet. Fuller and Falcon Jet Corporation were named as defendants. Falcon Jet delivered the jet into the custody of the District Court and cross-claimed for the storage costs. Fuller asserted good title based on its purchase from the Philippine government, acting through its agency, the Commission. The Commission's actions in acquiring the plane were, Fuller contended, acts of state, insulated from foreign judicial process. Faysound disagreed, countering with the treaty exception to the act-of-state doctrine. It argued that according to the Geneva *Convention on International Rights in Aircraft*, 4 U.S.T. 1830, T.I.A.S. 2847 (the United States and the Philippines are both signatories), the sequestration was improper from the start. And in any event, it had been lifted. The Commission could not convey to Fuller what it did not own.

The District Court sided with Faysound. On cross-motions for summary judgment, the Court rejected Fuller's act-of-state defense and awarded title to the jet to the plaintiff. The Court also rejected Falcon Jet's claim for storage costs. It held that it would be unfair to tax Faysound for a benefit the corporation had not sought. *Faysound Ltd. v. Walter Fuller Aircraft Sales, Inc.*, 748 F. Supp. 1365 (E.D. Ark. 1990). The District Court entered its judgment on October 29, 1990. On November 7th, Fuller filed a timely notice of appeal. Two days later, Falcon Jet filed

a motion to amend the judgment. Fed. R. Civ. P. 59(e). This motion was also timely. It asked the District Court to reconsider its refusal to assess storage costs against Faysound. On January 22, 1991, the District Court entered its order denying Falcon Jet's motion to amend the judgment.

II.

The appeal proceeded on a normal course. After briefing was completed and a variety of other motions had been dealt with, however, Faysound filed a motion to dismiss the appeal.[2] Faysound contends that Falcon Jet's Rule 59 motion voided Fuller's earlier notice of appeal. The judgment, it continues, was not final until the motion to amend had been decided. Fuller's failure to file a new notice of appeal after January 22 (when the District Court disposed of Falcon Jet's motion) allegedly dooms its appeal. The language of Federal Rule of Appellate Procedure 4(a)(4) strongly supports Faysound's analysis. "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 to alter or amend the judgment . . . , [a] notice of appeal filed before the disposition of [that motion] shall have no effect."

The Supreme Court has strictly enforced Rule 4. In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56

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[2] As Fuller points out, the motion was untimely, not having been filed within 15 days of the docketing of the appeal. See 8th Cir. R. 47A(b). However, we have a duty to examine our own jurisdiction, and to do so on our own motion if necessary. 8th Cir. R. 47A(a).

(1982) (per curiam), the Court rejected the view that an appellate court has discretion to consider a case on the merits when the notice of appeal is filed during the pendency of a Rule 59 motion. Provident's notice of appeal was filed after a motion to amend the judgment had been docketed, but before the motion had been decided. The Court held that the notice "was a nullity." Relying on the plain language of Rule 4, the Court explained: "[I]t is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act." *Griggs*, 459 U.S. at 61. In dicta, the Court also addressed the situation presented in our case. "Professor Moore has aptly described the post-1979 effect of a Rule 59 motion on a previously filed notice of appeal: 'The appeal simply self-destructs.' " *Ibid* (quoting 9 Moore, Ward, & Lucas, *Moore's Federal Practice* ¶ 204.12[1], p. 4-65 n.17 (1982)).

Fuller gives three reasons why its appeal remains intact. First, it argues that various pleadings filed in this Court after the judgment became final satisfy Fed. R. App. P. 3's requirements. Any one of these papers, according to Fuller, can and should be read as a notice of appeal. Second, it argues that the November 1990 notice of appeal is in fact sufficient. Fuller offers two paths to that conclusion: the *Forgay* doctrine, a narrow exception to the final-judgment rule, and the general appealability of injunctions under 28 U.S.C. § 1292(a)(1). Finally, Fuller argues that there are extraordinary circumstances present in this case that justify our taking jurisdiction. We are not persuaded by any of these arguments.

Assuming that the judgment became final on January 22, 1991, Fuller contends that it had until April 11, 1991,

to notice its appeal. (This of course is more than 30 days. Fuller says a bankruptcy proceeding tolled the normal time period, and we assume this is correct.) Fuller filed several papers with our Court during that period. Those documents included notice that the bankruptcy stay had been lifted, Fuller's reply brief, and a motion to show cause and take judicial notice of a court decision in the Philippines. Each of these papers, Fuller says, satisfies the spirit of Rule 3, and includes all the required information: the parties, the judgment appealed from, and the court being appealed to. Fed. R. App. P. 3(c). We disagree. It is true that filing a sufficient notice of appeal in the court of appeals instead of the district court is not a good reason to dismiss the appeal. Fed. R. App. P. 4(a)(1). It is also true that "informality of form or title" is not a fatal error. Fed. R. App. P. 3(c). But on the far edge of informality lies insufficiency. Looking past the fact that Fuller's supposed notices were filed in the wrong court, and reading those papers generously, Fuller's pleadings are still insufficient: they do not specify correctly the judgment being appealed from. All the various documents specify instead the District Court's October order, the original judgment, and not the final judgment entered on January 22, 1991, with the denial of Falcon Jet's post-judgment motion.

It is perfectly true, as Fuller repeatedly points out, that all during the spring of 1991, or at least until Faysound filed its motion to dismiss on May 16, all of the parties and this Court assumed that the appeal was properly before us, that there was no question as to its timeliness, and that the case was proceeding on course. It is also true that the technical error upon which Faysound has seized has not misled it in any material way, or

caused it any prejudice. In these circumstances, there is a strong temptation to try to find a way around the technical problem, for example, by treating the various papers filed with us by Fuller, or one of them, anyway, as the functional equivalent of a notice of appeal. With some regret, we conclude that the temptation must be resisted.

Jurisdiction is a technical subject, appellate jurisdiction perhaps more so than jurisdiction in general. It is important to have bright-line rules in this area, rules that can be easily applied at the early stages of a case to determine with certainty whether our jurisdiction has been properly invoked. If we allow ourselves to search through various documents in our Clerk's office, including even a letter from Fuller's counsel informing us of the lifting of a bankruptcy stay, in order somehow to piece together the various constituent elements necessary to a proper notice of appeal, this purpose will have been largely defeated. The short of it is that no piece of paper styled "notice of appeal" was filed in any court after the judgment of the District Court in this case became final, nor does any such piece of paper even have within it all of the information that a notice of appeal must contain. The Supreme Court has enforced the rules limiting our jurisdiction with uncompromising rigidity. See, in addition to the other cases cited, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (notice of appeal ineffective as to party appellant not expressly named therein; it is irrelevant that no one was misled).

Fuller also contends, in the alternative, that its November 1990 notice of appeal was sufficient. It argues that an immediate appeal should be allowed from the October judgment because the order created the risk of

irreparable harm by immediately shifting title to property. Fuller relies on *Forgay v. Conrad*, 6 How. 201 (1848) (Taney, C.J.), for this principle. Review is also proper, Fuller claims, because the judgment is an injunction appealable as of right under § 1292(a)(1). Both arguments are ways around the final-judgment rule. Neither is persuasive.

Forgay has come to stand for a narrow hardship exception to the final-judgment rule. When a district court orders an immediate transfer of title to property, irreparable harm is presumed, and the order is appealable – even though a final judgment has yet to be entered in the case. The procedural history makes clear, however, that *Forgay* does not apply to this case. No immediate transfer of title was ever ordered, and a transfer only became imminent a few days before the final judgment was entered in January 1991. The District Court's October 29 judgment was automatically stayed. Fed. R. Civ. P. 62(a). On November 7, Fuller took three actions: it filed a notice of appeal, asked the District Court to allow it to supersede the execution of the October judgment with a bond pending appeal, and asked for an extension of the Rule 62(a) stay while the District Court considered its motion for a bond. That same day Judge Woods extended the temporary stay, which had not yet lapsed, until he ruled on the bond request. On November 9 Falcon Jet filed its timely motion to amend the judgement. Though it could have, Fed. R. Civ. P. 62(b), Falcon Jet did not ask the District Court to stay its October judgment pending a decision on its Rule 59 motion. Throughout November and into December, briefs were filed on the motion for supersedeas. The District Court granted that motion, and

gave Fuller until January 2, 1991, to file the bond. The stay remained in effect.

Fuller, however, came to our Court on December 23, asking that we stay Judge Woods's order setting the bond. The bond, Fuller claimed, was excessive. We entered a stay on December 28, in order to consider Fuller's contention with care. Several weeks later after the benefit of briefing, we approved the bond set by the District Court. It was now January 17. We did not, however, dissolve our stay. We gave Fuller until January 28 to file the bond with the District Court. Meanwhile, back in the District Court, the judgment was becoming final. On January 22 Judge Woods denied Falcon Jet's motion to amend and entered the final judgment in this case. Our stay remained in effect. Fuller never filed the bond; it filed the bankruptcy proceeding mentioned above instead.

All this procedural history shows that this case is not a proper *Forgay* appeal. When Fuller filed its notice of appeal in November, there was no pending order requiring immediate execution of the judgment. Compare *Forgay*, 6 How. at 204. Nor was there an imminent date for execution of the judgment at that time. Compare *Minnesota & Ontario Paper Co. v. Swenson Evaporator Co.*, 281 Fed. 622, 625 (8th Cir. 1922) (Trieber, District Judge). There was, instead, stay upon stay in this case. We agree with Fuller, and Faysound concedes, that the availability of a supersedeas bond pending the appeal does not answer whether *Forgay* applies. See, *e.g.*, *Swenson Evaporator*, 281 Fed. at 623. *Forgay*, however, does not apply because, until our order of January 17, transfer of title was not imminent. At that point Fuller might have had a

good argument for a *Forgay* appeal. Whatever the possibilities for that strategy, however, they evaporated on January 22 when the District Court denied Falcon Jet's motion and entered final judgment. (Even then our stay remained in effect for six more days.) Any notice of appeal filed after that date would not have needed a *Forgay* crutch: this case had been concluded in the District Court, and it could have come to us as a whole.

In sum, *Forgay* does not help Fuller cure the jurisdictional defect in its appeal. When its notice of appeal was filed, and indeed until a few days before final judgment was entered, there simply was no threat of an immediate or imminent transfer of title to the Falcon Jet. Nor can the District Court's October judgment be transformed into an injunction by calling it one. We decline Fuller's invitation to flood that legal category by naming all orders which determine title to property "injunctions."

Fuller also argues that extraordinary circumstances justify this Court in taking jurisdiction. This is Fuller's last line of defense. Fuller raises two facts that supposedly make this case unique enough to overcome its Rule 4 problem: the parties and the Court have interacted for several months on the mistaken assumption that jurisdiction existed, and second, Fuller did not receive notice (as required by Fed. R. Civ. P. 77(d)) of the District Court's order denying Falcon Jet's motion to amend the judgment. The Supreme Court has held that an untimely appeal will be allowed on the ground of unique circumstances "only where a party has performed an act, which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that the act has been properly done." *Osterneck*

v. Ernst & Whinney, 489 U.S. 169, 179 (1989); see also *McKee v. Bi-State Development Agency*, 801 F.2d 1014, 1018 (8th Cir. 1986). Neither of the circumstances Fuller relies on meets this standard. It alleges no act that, but for a judicially sanctioned error, would have produced a properly noticed appeal.

We accept Fuller's counsel's statement that it received no notice of the entry of the District Court's order denying Falcon Jet's post-judgment motion under Rule 59(e). In the abstract, this circumstance creates a strong equity in Fuller's favor. The difficulty is that the express words of Fed. R. Civ. P. 77(d) foreclose this argument. Under that provision as presently in effect, the failure of counsel to receive notice is simply immaterial. Fuller points out that under new Fed. R. App. P. 4(a)(6), to become effective December 1, 1991, absent contrary action by Congress, this result will be changed. The fact that the rule will be amended in the future in such a way as to avoid the unfair result which is occurring in this case, however, is not helpful. Obviously the Supreme Court believes that Rule 77(d), in its present form, can produce unjust results. We have no reason to believe that Congress will interfere with this decision. But the rules are legislative in character. Changes normally do not apply retroactively. Certainly a change which has not yet taken effect (and which, conceivably, may never take effect) cannot be the basis of decision in the present case.

Finally, Fuller suggests that we have power under Fed. R. Civ. P. 60(a) "to correct the clerical mistake in the appellate record. . . . " Appellant's Response to Appellee's Motion to Dismiss Appeal for Lack of Jurisdiction, pp. 18-19. Fuller asks us to "deem" the January 22, 1991,

order to have been entered as of May 16, 1991, when Fuller first became aware of it. We should then, Fuller says, allow the filing of an additional notice of appeal. This is only another way of saying, in different words, that Fed. R. Civ. P. 77(d) should be ignored, and that the failure of Fuller's counsel to receive notice of the January order should be allowed to save this appeal. Such action would be contrary to the plain words of Rule 77, and we have no authority to take it.[3]

* * *

The "mandatory and jurisdictional" requirement that an appellant file a timely notice of appeal can operate harshly. *United States v. Robinson*, 361 U.S. 220, 224 (1960). It does so in this case. As surely as we must hear and decide cases within our power, however, we must not

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[3] On May 23, 1991, Fuller filed a motion in the District Court under Fed. R. Civ. P. 60(b), asking that Court to have the January order "deemed entered on May 16, 1991 due to the lack of notice thereof to Fuller. . . . " At the oral argument on this appeal, Fuller advised us that it had argued to the District Court that that Court had power to rule on this motion before we decide the question of our jurisdiction. Faysound noted that it had requested the District Court not to rule on this motion until we had decided the jurisdictional question. Later, Fuller advised us of the filing of a second Rule 60(b) motion in the District Court, this motion questioning the subject-matter jurisdiction of the federal courts over the entire case. In these papers Fuller argued that though the District Court has power to deny either motion before we rule, before it could grant a Rule 60(b) motion and dismiss the case, we would have to remand the case. That is a correct statement of the law. No motion to remand has been filed.

decide cases beyond our reach. We are obliged to dismiss this appeal for lack of jurisdiction.

Dismissed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FAYSOUND LIMITED PLAINTIFF

V. No. LR-C-89-834

WALTER FULLER AIRCRAFT SALES, INC.
and FALCON JET CORPORATION DEFENDANTS

JUDGMENT

(Filed OCT 29 1990)

Pursuant to the Memorandum Opinion filed contemporaneously herewith, summary judgment is hereby granted in favor of plaintiff Faysound Limited. On the motion for summary judgment filed by defendant Walter Fuller Aircraft Sales, Inc., the same is hereby denied and judgment on said motion is rendered in favor of plaintiff Faysound Limited.

In conformity with this ruling, title to the Falcon 50, which is the subject of this litigation, is vested in the plaintiff Faysound Limited free and clear of any and all encumbrances save for the costs of any repairs made on said plane by the Falcon Jet Corporation. The claim for storage charged on behalf of Falcon Jet is denied since Faysound bears no responsibility for the presence of the plane at the Falcon Jet facility in Little Rock, Arkansas. At any rate, Falcon Jet interpled the plane into the custody of the Court and under these circumstances cannot claim storage for the plane. Storage charges may be claimed by Falcon Jet against Faysound Limited beginning with the date of this Judgment.

Costs are assessed against defendant Walter Fuller Aircraft Sales, Inc.

this 29 day of October, 1990.

/s/ Henry Woods
HENRY WOODS,
U.S. District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 10-29-90 BY BMC

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FAYSOUND LIMITED

PLAINTIFF

V. - No. LR-C-89-834

WALTER FULLER AIRCRAFT SALES, INC.
and FALCON JET CORPORATION

DEFENDANTS

MEMORANDUM OPINION

(Filed Oct. 29, 1990)

Carl R. Brents, Clerk

I. STATEMENT OF FACTS

Faysound Limited ("Faysound"), a Hong Kong corporation, purchased a Falcon aircraft, the subject of this lawsuit, from the manufacturer at a cost of over nine million dollars. The plane was then leased to a Philippine corporation, United Coconut Chemicals ("UNICHEM") for a period of five years on October 23, 1982. Paragraph 6.1 of the lease agreement reads as follows:

> The aircraft may be used anywhere in the world and for this purpose the LESSEE may register the aircraft under the pertinent laws of such country as may be selected by the LESSEE. It is understood and agreed that the LESSEE is authorized by the LESSOR to register the aircraft under Philippine Registry. For this purpose, the LESSOR, upon request of the LESSEE, or the LESSEE itself, may cause the cancellation

> of the registration of the aircraft under any foreign registry.

(PX MM). The plan was then registered with the Philippine Bureau of Air Transportation on November 2, 1982, for use in the Philippines. UNICHEM's status was noted by striking the word "owner" and inserting the word "operator" above it. (*Id*). The original certificate registered the Falcon as "Name of operator: United Coconut Chemical, Inc. (Lessee)." *Id*.

The back of the certificate had the following entry:

> Aircraft herein registered is subject to the Lease Agreement entered into by and between FAY-SOUND, LTD., a corporation organized and existing in accordance with the laws of Hong Kong (Owner-Lessor) and UNITED COCONUT CHEMICALS, INC., a corporation organized with the laws of the Philippines with principal address, offices at UCPB Bldg., Makati, M.M. (Operator-Lessee). (Contract of Lease on file).

(PX LL). For the next five years, which comprised the entire term of the lease, UNICHEM renewed its registration of the Falcon. (PX NN, 00, PP and QQ). The same entries were made in Bureau registration records.

The former Philippine President, Ferdinand Marcos, fled the Philippines on February 25, 1986. His successor, Corazon Aquino, created the Philippine Presidential Commission on Good Government ("PCGG") and charged it with the task of recovering ill-gotten assets of former President Marcos and his close associates. On June 19, 1986, the PCGG issued a Writ of Sequestration against one Eduardo Cojuangco, Jr., describing several aircraft

including the Falcon. (PX SS). Cojuangco was a multi-millionaire businessman with substantial interest in UNI-CHEM and undoubtedly a close friend and adviser to Marcos. The Writ of Sequestration did not name Faysound nor was it served upon its agent. (PX YY). The writ therefore created no legitimate basis under Philippine law for the PCGG to seize any asset of Faysound. (PX WW at pp. 9-13). After the plane was sequestered, UNI-CHEM renewed the registration with the Philippine Civil Aircraft Registry for the last year of the lease on October 30, 1986. (PX QQ).

On July 31, 1987, the PCGG instituted action against Eduardo Cojuangco, Jr. to recover his ill-gotten wealth. The complaint was filed in the Sandiganbayan Court, the special Philippine court established to adjudicate cases brought by the PCGG to recover ill-gotten assets, and assigned Civil Case No. 033. The complaint did not name Faysound nor any of the lessees of the Falcon. (PX YY, 9). The Falcon remained in the PCGG custody, but there was no (PX WW). Faysound instituted demands on its lessees for redelivery of the Falcon. (PX KK). On August 2, 1988, the authority of the PCGG to issue sequestration orders lapsed, and under Philippine law any prior sequestration order upon which no judicial action was filed before August 2, 1987 was "deemed automatically lifted." Because no action was filed against the lessee or owner of the Falcon, as a matter of Philippine law, the writ of sequestration was deemed lifted on August 2, 1987.

The Falcon sat at the Villamo Air Base in the Philippines and began to deteriorate. The PCGG began efforts to sell the plane. It is not necessary to go into the efforts to sell the plane. Several prospects emerged, and efforts

finally culminated in a sale to the defendant Walter Fuller Aircraft Sales, Inc. ("Fuller"). It is not necessary to a decision on the summary judgment issue to examine all of these negotiations. Suffice it to say that there is a strong aroma of corruption and bribery in connection with the sales efforts of PCGG.

The PCGG ultimately determined that it would be necessary to obtain the Sandiganbayan Court's approval of the sale of the Falcon (PX WW). As that court noted in its opinion:

> [I]t appeared that the Solicitor representing the plaintiff did not know too many details about the relationship of the aircraft and the United Coconut Chemicals, Inc. (UNICHEM).
>
> It appears that UNICHEM is not a sequestered company but rather a company where only the shareholdings of defendant Eduardo Cojuangco, Jr. have been sequestered. . . . It likewise appears that UNICHEM had not been furnished with a copy of the instant Motion and that it had not been intended to be so furnished (the notices were addressed only to defendant Cojuangco's lawyers of record). The consideration of said motion was, therefore, deferred.

Id. at 2.

After the Sandiganbayan Court deferred consideration of the PCGG's first Motion to sell the Falcon, the PCGG filed a motion for early Resolution of its Motion to Sell on April 5, 1989. *Id.* This Motion was set for hearing on April 14, 1989. *Id.* at 3. The PCGG argued that the Sandiganbayan Court did not need to resolve issues concerning the validity of the sequestration or questions

concerning whether Cojuangco, the named defendant in the sequestration case, even owned the Falcon. *Id.* The Sandiganbayan Court rejected the PCGG's argument:

> The Court is unable to respond positively to plaintiff's position.
>
> Unquestionably, neither the issue of the ownership of the aircraft nor the propriety of the sequestration thereof has been raised in the pleadings before the Court with regard to the motion to sell the aircraft in question.
>
> Invocation, however, of the power of the court to authorize the disposition of a sequestered asset or a seized property (the sequestration or seizure of which was not upon this Court's authority) must necessarily, though perhaps implicitly, include a plea for the affirmance of the propriety of that seizure. And were there no reason for this Court to doubt the original seizure, then this Court would, as it must, accord the PCGG the rebuttable presumption of regularity in its act.
>
> The plaintiff-movant through the PCGG itself, however, has presented this Court with the facts which serve to dilute the presumption of regularity which this Court would accord the PCGG's own acts, namely:
>
> (1) The aircraft in question is apparently NOT owned by UNICHEM;
>
> (2) It is apparently NOT owned by defendant Cojuangco either but, upon plaintiff's own admission, by "Faysound." Certainly no averment has been made either by PCGG or anybody else to prove false the data on the

Certificate of Registration of that aircraft to that effect;

(3) UNICHEM itself is not a sequestered corporation (only the shares of stock therein owned by defendant Cojuangco appear to have been sequestered);

(4) The lease over the aircraft, according to the plaintiff itself, lapsed (in 1987) more than two years ago;

(5) The renewal of the Certificate of Registration issued by the Bureau of Air Transportation on October 30, 1986, *four* months AFTER this and other aircraft had been ordered sequestered per writ of sequestration on file with this Court.

There is, then, every indication on the very face of the pleadings of plaintiff-movant and the allegations in open Court that the sequestration of the aircraft now sought to be sold was not in order. It is true that no one, not even the lessor has come to Court nor, as far as this Court is properly informed, has anyone sought to question the propriety of the plaintiff's (or PCGG's) seizure thereof anywhere else. This silence from others who may be parties in interest to this aircraft, however, does not justify authorization of the projected sale of that aircraft when it becomes apparent that the premises for such an authorization do not exist – in this instance, a valid sequestration.

Id. at pp. 3-5 (footnote omitted).

The PCGG, through the Solicitor General, had argued the Court need not concern itself with who owned the

Falcon because that could be resolved later. The Court was unimpressed:

> It will not do to say that the issue of ownership can be taken up later when the case proceeds to trial since one of the issues, even now, remains the *prima facie* propriety of PCGG's seizure thereof which PCGG now makes abundantly apparent to have been absent.

Id. at 5.

After the hearing on the PCGG's Motion for Early Resolution on March 14, 1989, the PCGG reversed its earlier position that it required Sandiganbayan Court approval to sell the Falcon. *Id.* at 7. The Sandiganbayan Court attributed this about-face to the fact that the PCGG knew Court approval of the proposed sale was unlikely:

> The Motion to Sell the aircraft was heard on April 14, 1989 where very pointed questions were asked by the Court about the propriety of the sequestration of the aircraft in question and the resulting propriety of selling the same. Until that date the PCGG acknowledged its need for court authority before selling this aircraft.

Id.

Accordingly, on April 27, 1989, the Philippine Solicitor General filed a Motion to Withdraw the PCGG's earlier request for authority to sell the Falcon at the request of PCGG Commissioner DeLeon. *Id.* The Sandiganbayan Court initially viewed the Motion to Withdraw as a decision by the PCGG not to sell the Falcon. *Id.* The Sandiganbayan Court stated:

> The Motion to Withdraw can and could only be viewed as a desistance by the PCGG from the

> original plan for the sale of the aircraft. Rather than issue a resolution pointing out the breach by the PCGG of the basic precepts of fairness, justice and due process, the Court acceded to the withdrawal of the motion and deemed the matter of the proposed sale moot and academic.

Id. But DeLeon and his fellow commissioners at the PCGG had not in fact abandoned the sale; instead, the PCGG publicly acknowledged that it intended to sell the Falcon "sans court consent." *Id.* In addition, according to the Sandiganbayan Court's opinion, Tony Daguna, the lawyer for International Enterprises, Inc., learned of the Sandiganbayan Court's accession to the motion to withdraw "even before the process servers of the Court had served the resolutions granting the withdrawal." *Id.* at 8.

This inside knowledge and the PCGG's about-face greatly disturbed the Sandiganbayan Court. In the words of the justices of the Sandiganbayan Court, "[t]he withdrawal turned out to be a ploy for a scheme to proceed with the sale without the obstruction of an unexpected negative [Sandiganbayan Court] Order." *Id.* at 7. With regard to Daguna's apparent inside information, the Sandiganbayan Court stated that it "views with concern the alacrity with which the prospective buyer of that aircraft sought a copy of this Court's resolution almost simultaneously with the announcement of the cynical maneuver by which the PCGG intended to do away with Court authority for the disposition of property in *custodia legis* – which is what sequestered property is." *Id.* at 9.

Obviously appalled by the PCGG's scheme, the Sandiganbayan Court recalled its resolution permitting the

PCGG to withdraw its Motion to Sell. *Id.* Once this resolution was recalled, the Sandiganbayan Court ruled on the merits of PCGG's Motion for Authority to Sell the Falcon and denied it in scathing language:

> For this Court to allow the sale of the property belonging to a stranger to the suit (the lessor) to take place more than two years *after* the lease thereof had expired (and when return, therefore, should have been made to the owner/lessor), and for that sale to be justified only by the fact that this very valuable piece of property (U.S. $10 million) has rapidly deteriorated for having been unattended to by the very sequester itself, as the sequester PCGG has said, is neither just nor legal.
>
> What is worse is that plaintiff has acted before this Court without any care or effort to show that these facts and events notwithstanding, the sequestration was at least apparently appropriate. The PCGG, in the words of the Supreme Court, is not above the law . . . and it is bound to justify its continued exercise of powers in the face of its own contradicting evidence.
>
> . . . .
>
> For all of these reasons, plaintiff cannot ask this Court to sanctify its acts as sequester while, in the face of its own debilitating evidence, it remains unwilling to explain why a stranger's property has been sequestered.

Id. at 10, 12 (citation omitted).

Finally, the Court criticized the basis asserted by the PCGG as an excuse to sell the Falcon:

> Plaintiff urges authority to sell because the airplane is allegedly deteriorating rapidly, the airplane by the plaintiff's own admission having been unattended to since sequestration. Care of sequestered property is the sequester's primary responsibility. Plaintiff's failure at that duty cannot justify the sale of *property which, to all appearance, belongs to a stranger and should not have been seized in the first place.*

Id. at 13 (emphasis supplied).

The Motion to Sell was denied "since in the very first instance, no justification *prima facie* or otherwise has been demonstrated for its seizure from its lessee." *Id.*

When the Sandiganbayan Court issued this scathing opinion on May 18, 1989, the PCGG sought immediately to avoid this public rebuke and also to avoid the Sandiganbayan Court's injunction "to report to the court the status of the projected sale of the aircraft and its present location" within ten days of the Order. (Condes Dep., Response Ex. T at 6, 12-13). An Assistant Solicitor General for the Philippines agreed on behalf of the Solicitor General to help the PCGG avoid the Sandiganbayan Court's Order in return for a "token" from the proceeds of the sale. (Condes Dep., Response Ex. T at 6, 12-13).

Thereafter, on June 6, the PCGG filed a petition for certiorari with the Supreme Court of the Philippines requesting (a) a temporary restraining order from enforcement of the Resolution of the Sandiganbayan Court, and (b) ultimately a ruling that the Resolution is void as undue interference with the administrative/executive functions of the PCGG (Response Ex. X-1). The PCGG did not seek a ruling that the sequestration was

valid or a ruling as to the lawful owner of the Falcon, asserting instead that the sale of the Falcon will not "prejudice the rightful owners as may be finally declared by the respondent Sandiganbayan." *Id.* at 26. On the same day the Petition was filed, the Supreme Court "Resolved, *without giving due course to the petition,* to require the respondent to COMMENT" on the petition and in the interim issued a temporary restraining order ordering the Sandiganbayan Court to desist from enforcing the Resolution pending further order of the Court. (Response Ex. Y (emphasis supplied)). That is, the Supreme Court did not even consider whether it would grant certiorari and hear an appeal; the effect of its ruling is that the only reporting requirement of the Resolution was temporarily stayed. (Antonio Aff., Response Ex. U at 18-19).

Commissioner DeLeon, whose activities in connection with the sale of the aircraft are highly suspicious, seized upon the action of the Supreme Court, which were actually not significant, as granting authority for the PCGG to sell the plane. The Supreme Court has never granted such authority nor has it granted any review of the decision of the Sandiganbayan Court. On September 21, 1989, the PCGG accepted Fuller's bid subject to settling with Condes to satisfy the "Condes lien." Condes was a major factor in the negotiations between the putative purchaser and the PCGG. This lien in the amount of 1.7 million dollars appears to be a cover for bribes paid to various Philippine officials. Slightly over five million dollars went to the PCGG.

The PCGG gave a bill of sale to Fuller. The plane was flown out to be reconditioned at Falcon Jet's maintenance plant at Little Rock, Arkansas, where it is now located.

II. DISCUSSION

A. The Treaty Exception of the "Act of State" Doctrine

Both parties have moved for summary judgment. Summary judgment is granted in favor of the plaintiff Faysound and denied as to defendant Walter Fuller Aircraft Sales, Inc. Defendant seeks to defend a clear expropriation of plaintiff's property on the ground of the "act of state" doctrine. This doctrine was articulated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), where the Castro government in Cuba expropriated a shipment of sugar sold under a futures contract while the sugar was being loaded on a ship in Cuba. The Supreme Court held:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

376 U.S. at 427-28.

This case comes clearly within the exception noted, supra. Both the United States and the Philippines are signatories to the Geneva Convention, which covers property rights in aircraft along with other aviation subjects. While the *Sabbatino* Court was not anxious to enter the conflict of ideologies involved in the Cuba expropriation, it acknowledged that most principles of international law are not so difficult:

> There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law.

376 U.S. at 430, n.34. The Geneva Convention represents an area of broad national consensus. The Treaty in Article I provides as follows:

> (1) The Contracting States undertake to recognize:
>
> (a) rights of property in aircraft;
>
> (b) rights to acquire aircraft by purchase coupled with possession of the aircraft;
>
> (c) rights to possession of aircraft under leases of six months or more;
>
> (d) mortgages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness;
>
> provided that such rights
>
> (i) have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality at the time of their constitution, and
>
> (ii) are regularly recorded in a public record of the Contracting State in which the aircraft is registered as to nationality.

> (2) Nothing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting State; but Contracting States shall not admit or recognize any right as taking priority over the rights mentioned in paragraph (1) of the Article.

The case at bar is clearly within the exception noted in *Sabbatino*. The expropriation in that case was not proscribed by a treaty couched in clear and unambiguous terms. Congress almost immediately enacted legislation to overrule the decision. The Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) was "enacted to make sure that the United States not become a 'thieves market' for the product of foreign expropriation." 110 Cong. Rec. 19,557, 88th Cong. 2d Sess. (1964):

> The amendment is designed to discourage uncompensated expropriation of foreign investment by preserving the right of the original owners to attack any taking in violation of international law if the property involved comes before a U.S. court. Because the United States is the largest market for the products of many U.S. owned companies in foreign countries, the knowledge that this market will be denied to stolen property should discourage seizure of that investment.

Id.

On remand of the *Sabbatino* case from the Supreme Court of the United States, the District Court and the Court of Appeals for the Second Circuit held that the Hickenlooper Amendment compelled a different result and had in effect vitiated the *Sabbatino* decision. *Banco*

Nacional de Cuba v. Farr, 243 F.Supp. 957 and 272 F.Supp. 836 (S.D. N.Y. 1965), *aff'd.* 383 F.2d 166 (2d Cir. 1967), *cert. denied* 390 U.S. 956 (1968). Any remaining efficacy of the *Sabbatino* case has been further weakened by the decisions of the Supreme Court in *First Nacional City Bank v. Banco Nacional de Cuba,* 406 U.S. 759 (1972); *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976); and *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.,* 110 S.Ct. 701 (1990).

Fuller argues that the Hickenlooper Amendment applies only if the property of a United States citizen is involved and only when the expropriated property or its proceeds were in the United States when the expropriation occurred. For its claim that the Amendment does not apply to aliens, Fuller Aircraft cites the First Hickenlooper Amendment, 22 U.S.C. § 2370(e)(1), rather than the Second Hickenlooper Amendment. Unlike the Second Hickenlooper Amendment, the First Hickenlooper Amendment by its terms refers only to United States citizens. The Second Hickenlooper Amendment contains no such limitation. Indeed, the Reporters for the Restatement of the Foreign Relations Law of the United States disagree with Fuller Aircraft's contention. "The Amendment, if otherwise applicable, would apparently apply to a claim by an alien as well as by a national of the United States . . . . " *Rest. 3rd. Restatement of the Foreign Relations Law of the United States,* § 444, Reporter's Note 6.

Fuller Aircraft is similarly misguided in arguing that the Second Hickenlooper Amendment does not apply because the Falcon was not in the United States when the expropriation occurred. Comment e to § 444 of the *Rest.*

3rd, Restatement of the Foreign Relations Law of the United States provides:

> e. *Claim to specific property.* The exception to the Act of State Doctrine embodied in the Second Hickenlooper Amendment has been held to be limited to actions asserting title to property *before the court*. Thus, if the plaintiff claims ownership of a vessel that has been taken by a foreign state and the vessel is at a port in the United States, the plaintiff may rely on the Amendment in asserting title before a court in the United States . . . .
>
> In order for the Hickenlooper Amendment to apply, the plaintiff must allege and prove that the property that is the subject of the claim is in the United States or was there at the time the action was commenced.

(Emphasis supplied).

As noted above, the *Sabbatino* case makes a clear exception where the expropriation is covered by a treaty. The act of state doctrine "was never intended to apply when an applicable bilateral treaty governs the legal merits of the controversy." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1540 (1984). The provisions of the Treaty set out, *supra*, are clear and unambiguous. They provide governing legal standards for the Court's determination of the issues:

> Additionally, there is a great national interest to be served in this case, i.e., the recognition and execution of treaties that we enter into with foreign nations. Article VI of the Constitution provides that treaties made under the authority of the United States shall be the supreme law of

> the land. Accordingly, the Supreme Court has recognized that treaties, in certain circumstances, have the "force and effect of a legislative enactment." *See, e.g., Whitney v. Robertson,* 124 U.S. 190 (1888). The failure of this Court to recognize a properly executed treaty would indeed be an egregious error because of the position that treaties occupy in our body of laws.

Kalamazoo Spice & Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 428 (6th Cir. 1984).

B. Applicability of "Act of State Doctrine"

Another serious question in this case is whether the acts of the PCGG were true "acts of state." Fuller must prove that PCGG exercised sovereign power in its sequestration and sale of the Falcon. We hold it did not exercise such power. *Alfred Dunhill of London v. Republic of Cuba,* 425 U.S. at 691.

The only evidence offered to show that PCGG had authority to sell the plane in the exercise of Philippine sovereignty is an affidavit from Rosalio DeLeon, a PCGG Commissioner. DeLeon's motives and actions are highly suspect. He is the brother-in-law of Ben Cuevo, one of the Philippine "middle men" appointed as exclusive agent by Fuller.

Plaintiff has submitted the deposition testimony of Art Condes, one of the main players in the attempt to sell the Falcon, that DeLeon was to receive a bribe of $150,000. Plaintiff has also submitted an affidavit from a

former Solicitor General and Supreme Court Justice, specifically controverting DeLeon's affidavit with regard to the PCGG's authority under a Writ of Sequestration:

> Assuming, however, that the Falcon aircraft had been validly sequestered . . . there can be hardly any doubt that the sequestration of the aircraft may be deemed to have been "automatically lifted" as of August 2, 1987.
>
> . . . .
>
> But even if it is assumed that the sequestration of June 19, 1986, on the Falcon aircraft continues to be effective, PCGG had no authority to sell the aircraft. The power to sell property pertains to the owner (Article 428 and 429, Civil Code). And the Supreme Court has ruled that sequestration does not vest in the PCGG the right of ownership.

(Antonio Affidavit, Response Ex. U at 11,12).

Assuming that the above conduct raises factual issues that are not appropriate for disposition by summary judgment, there are other factors that as a matter of law preclude Fuller reliance on the "act of state" doctrine. To establish that sale of the plane was an act of state, Fuller relies on three executive orders of President Aquino which are summarized as follows. Executive Order No. 1 creates the PCGG for the purpose of recovering all ill-gotten wealth. It charges the PCGG with the task of assisting Aquino in (1) recovering all ill-gotten wealth accumulated by Marcos and his close associates; (2) investigating cases of graft and corruption assigned to it by the President; (3) sequestering or placing or causing to be placed under its control or possession any building

or office wherein any ill-gotten wealth or properties may be found; (4) provisionally taking over in the public interest or to prevent its disposal or dissipation, business enterprises and properties of Marcos and his close associates.

Executive Order No. 2 addresses the funds, money, assets and properties illegally acquired or misappropriated by Marcos and his associates. This order (1) authorizes the freezing of all assets and properties in the Philippines in which Marcos or his associates have an interest or participation; (2) prohibits any person from transferring, conveying or otherwise depleting or concealing such assets; (3) requires all persons in the Philippines holding such assets to make such disclosure; and (4) authorizes the PCGG to request and appeal to foreign governments wherein any such assets or properties may be found to freeze them pending adjudication of ownership in the Philippine Court.

Executive Order No. 14 gives the Sandiganbayan Court original jurisdiction over cases involving the ill-gotten wealth of Marcos and his associates. No provision of these executive orders authorizes the expropriation and sale of property belonging without question to a Hong Kong national.

The writ of sequestration that PCGG issued against Eduardo Cojuangco, Jr. surely cannot be the "act of state" on which Fuller relies. Cojuangco did not own the plane. A company in which he owned stock leased the plane. The lease had almost expired. The owner of the plane is not a party to the sequestration order. In any event sequestration by the PCGG vests no title in the latter, as

the Philippine Supreme Court has aptly pointed out. It is a method of conserving the property *pendente lite.*

> [T]he act of sequestration, freezing or provisional takeover of property does not import or bring about a divestment of title over said property; does not make the PCGG the owner thereof. In relation to the property sequestered, frozen or provisionally taken over, the PCGG is a conservator, not an owner. Therefore, it cannot perform strict acts of ownership.

Baseco v. PCGG, 150 S.Ct. Rep. Ann. 81, 236 (Philippine S.Ct. 1987).

As a matter of fact, Fuller in his original brief identified the PCGG as a receiver. A court-supervised trustee does not exercise sovereign power under the "act of state" doctrine. *See Remington Rand Corp. v. Business Systems, Inc.,* 830 F.2d 1260 (3rd Cir. 1987). The PCGG as a receiver must act under the authority of a court. By President Aquino's Executive Order No. 14, that court was the Sandiganbayan Court. That Court denied PCGG the authority to sell this plane and scathingly denounced its action in regard to the seizure and attempted sale of the plane, as was pointed out, *supra,* in the Statement of Facts. The order was never reversed or vacated by the Supreme Court.

To qualify as an act of state, it is necessary to prove that the act "occurred as a result of a considered policy determination by a government to give effect to its political and public interest – matters that would have significant impact on American foreign relations." *Mannington Mills, Inc. v. Congoleum Corp.,* 595 F.2d 1287, 1295 (3rd Cir. 1979). The Court in *Mannington Mills* refused to grant

"act of state" status to a foreign sovereign's grant of a patent. Similarly, a foreign judicial judgment in a case involving private litigants does not rise to the status of an act of state. *Timberlane Lumber Co. v. Bank of America,* 549 F.2d 597, 607-08 (9th Cir. 1976). Nor does a party's initiation of foreign judicial proceedings amount to an act of state. *Dominicus Americana Bohio v. Gulf & Western,* 473 F.Supp. 680, 689 (S.D. N.Y. 1979). And as the Supreme Court stressed in *Alfred Dunhill of London, supra,* a foreign naval officer's operation of the foreign sovereign's ship on behalf of the sovereign does not give rise to an act of state. 425 U.S. at 693-64.

C. The Bribery Issue

This court is reluctant to rely on the rather obvious inference that the transaction was tainted with bribery and corruption. One significant aspect is that Fuller was required to discharge the so-called "Condes lien" before the sale could be completed. The amount of this lien was never disclosed but appears to have been in the neighborhood of two million dollars. It is a fair inference that the Condes lien was a device to cover up and launder bribes to various Philippine officials. Such factual proof is difficult when the site of the transaction is in a foreign country. I do not find it necessary to decide the bribery issue as a further means of negating the "act of state" doctrine on which Fuller relies. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.,* 110 S.Ct. 701 (1990). There is ample basis for sustaining the plaintiff's motion for summary judgment on other grounds.

III. CONCLUSION

The PCGG expropriated an expensive airplane without any legal basis whatsoever. Although the plane was leased to a company in which an associate of Ferdinand Marcos was a stockholder, the Marcos associate owned no interest whatsoever in the plane, and the lease was near the end of its term. The plane was nevertheless seized and sold in a transaction having the strong odor of corruption. The sale was made in the face of an adverse ruling by the Philippine court having supervision over it – a ruling never reversed by the Philippine Supreme Court. The seizure and sale violated the specific terms of the Treaty known as the Geneva Convention covering property rights in aircraft. It violated principles of international law, the Second Hickenlooper Amendment, as well as principles of Philippine law enunciated by the Philippine court having jurisdiction over this matter.

This 29 day of October, 1990.

/s/ Henry Woods
HENRY WOODS,
U.S. District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 10-29-90 BY BMC

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FAYSOUND LIMITED

PLAINTIFF

V. No. LR-C-89-834

WALTER FULLER AIRCRAFT, et al.

DEFENDANTS

ORDER

(Filed January 18, 1991)

Defendant Falcon Jet Corporation has moved the court to amend the October 29, 1990 Judgment in this case. I have considered both the motion and the responses in opposition to the motion. The points raised by Falcon Jet in its motion were taken into account at the time the Order and Judgment were entered.

Accordingly, Falcon Jet's Motion to Amend Judgment is hereby DENIED this 18th day of January, 1991.

/s/ Henry Wood
UNITED STATES DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 1-22-91 by DC.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-2896EA

Faysound Limited, Appellee, v. Falcon Jet Corp., Walter Fuller Aircraft, Sales, Inc., Appellant.	* * * * * * * * *	On Appeal from the United States District Court for the Eastern District of Arkansas.

Filed: March 18, 1991

ORDER

We have before us appellee Faysound's response to appellant Fuller Aircraft's amended notification of bankruptcy. Fuller Aircraft's request for a stay of this proceeding has been removed by the amendment. Accordingly, this case will proceed on a normal course unless and until this Court is advised of any order from the Bankruptcy Court for the Northern District of Texas requiring contrary action.

It is so ordered.

A true copy.

Attest: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-2896EA

Faysound Limited, Appellee, v. Falcon Jet Corp. Walter Fuller Aircraft Sales, Inc., Appellant.	* * * * * * * * * *	On Appeal from the United States District Court for the Eastern District of Arkansas.

Filed: September 23, 1991

Before ARNOLD, Circuit Judge, HEANEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

ORDER

Appellant Walter Fuller Aircraft Sales, Inc., has moved us to remand this case to the District Court, in order to enable that Court to rule on a pending motion under Fed. R. Civ. P. 60(b). The motion to remand is denied. The petition for rehearing, with suggestion for

rehearing en banc, remains pending and will be decided in due course.

It is so ordered.

A true copy.

Attest:

/s/ Michael E. Gaus
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FAYSOUND LIMITED PLAINTIFF

V. No. LR-C-89-834

WALTER FULLER AIRCRAFT SALES, INC.
and FALCON JET CORPORATION DEFENDANTS

ORDER

(Filed AUG 29, 1991)

Walter Fuller Aircraft Sales, Inc. filed two motions pursuant to Fed. R. Civ. Proc. 60(b) after notice of appeal was filed. The 60(b) motion to dismiss for lack of jurisdiction is without merit. The second 60(b) motion, to deem the date of entry of this Court's order denying Falcon Jet's request for fees and costs to be May 16, 1991, would be granted. However, this court currently has no jurisdiction to rule affirmatively on that motion. *See Winter v. Cerro Gorda County Conservation Board*, 925 F.2d 1069, 1973 (8th Cir. 1991).

DATED this 29th day of August, 1991.

/s/ Henry Woods
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-2896EALR

Faysound Limited,	*	
Appellee,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
v.	*	
Falcon Jet Corp.	*	
Walter Fuller Aircraft Sales, Inc.,	*	
Appellant.	*	

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

September 27, 1991

Ordered Entered at the Direction of the Court:

/s/ Michael E. Gaus
Clerk, U.S. Court of
Appeals; Eighth Circuit

EXHIBIT 'A'

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WALTER FULLER AIRCRAFT SALES, INC. — APPELLANT

VS.

NO. 90-2896

FAYSOUND LIMITED and FALCON JET CORPORATION — APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF ARKANSAS WESTERN DIVISION

HONORABLE HENRY WOODS, DISTRICT JUDGE

AFFIDAVIT OF MELINDA G. JAYSON

THE STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned notary, on this day personally appeared MELINDA G. JAYSON, a person to me known, who being by me duly sworn on her oath stated:

1. My name is Melinda G. Jayson. I am over the age of eighteen years, have never been convicted of a crime, and am fully competent to make this affidavit. I make this affidavit based on my personal knowledge. Through my professional corporation I am a partner in the law firm of Akin, Gump, Strauss, Hauer & Feld, counsel to Appellant

Walter Fuller Aircraft Sales, Inc. ("Fuller") in the above-styled and numbered appeal.

2. On March 13, 1991 I wrote a letter to Mr. Robert St. Vrain, Clerk of the United States Court of Appeals for the Eighth Circuit, and enclosed with that letter a copy of the bankruptcy court's order of March 12, 1991 in No. 391-30496-SAF-11, *In re Walter Fuller Aircraft Sales, Inc.*, a voluntary proceeding in bankruptcy filed by Fuller in the United States Bankruptcy Court for the Northern District of Texas. A copy of my letter and enclosure is attached hereto collectively as Exhibit A. While the letter which I wrote on March 13 erroneously referenced an Eighth Circuit order as dated March 12, 1991, which actually was the date of the bankruptcy court order, rather than the Eighth Circuit's order of February 27, 1991, my letter and the enclosed order identify Fuller as the appellant, the court to which appeal was being taken, and the judgment from which appeal was taken, and were intended to show Fuller's intent to proceed promptly with its appeal.

3. Attached hereto as Exhibit B is a true and correct copy of Akin, Gump's internal record of forwarding Exhibit A by federal express to Mr. St. Vrain which is dated March 13, 1991.

4. Akin, Gump, Strauss, Hauer & Feld never received a copy of the order signed by the Honorable Henry Woods, District Judge, on January 18, 1991 in No. LR-C-89-934, *Faysound Limited v. Walter Fuller Aircraft Sales, Inc. and Falcon Jet Corporation* from the district clerk in the Eastern District of Arkansas or from the district court, nor did this firm receive from the district clerk or from the district court a copy of the order entered in that

action of April 12, 1991. Akin, Gump, Strauss, Hauer & Feld was not provided any oral communication from the Arkansas district clerk or district court regarding the entry of either the January 18, 1991 or April 12, 1991 orders signed by Judge Woods in No. LR-C-89-934, *Faysound Limited v. Walter Fuller Aircraft Sales, Inc. and Falcon Jet Corporation.*"

Further Affiant sayeth not.

/s/ Melinda G. Jayson
MELINDA G. JAYSON

SUBSCRIBED AND SWORN TO BEFORE ME on the 28th day of May, 1991, to certify which witness my hand and official seal.

/s/ Paula Roberts
Notary Public – State of Texas

_____
Printed Name

Commission Expiration ____

[SEAL] [SEAL] PAULA ROBERTS
COMMISSION EXPIRES
APRIL 22, 1993

EXHIBIT A

AKIN, GUMP, STRAUSS, HAUER & FELD
ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS

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TELEX 73-2324 CABLE AGSH &F DALLAS
FAX (214) 922-8043

WRITER'S DIRECT DIAL NUMBER (214) 969-2744

March 13, 1991
VIA FEDERAL EXPRESS

Mr. Robert St. Vrain
Clerk, Eighth Circuit Court
U.S. Court & Custom House
1114 Market Street
St. Louis, MO 55101

Re: No. 90-2896; Faysound Limited v.
Walter Fuller Aircraft Sales, Inc.

Dear Mr. St. Vrain:

By order dated March 12, 1991, the Eighth Circuit stayed the referenced case pending notification that the bankruptcy court had lifted the stay to let this appeal proceed. Counsel to Faysound will be sending the notice to you at this time as well, but we wanted to be sure the Eighth Circuit had prompt notice and have enclosed a copy of the Court's order with this letter.

MGJ:pr
Enclosure

cc: Vince Foster

Sincerely,

/s/ Melinda G. Jayson P.C.
Melinda G. Jayson, P.C.

Daniel J. Sherman
SHERMAN & YAQUINTO
509 N. Montclair Avenue
Dallas, Texas 75208-5498
(214) 942-5502
ATTORNEYS FOR FAYSOUND LIMITED

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
WALTER FULLER AIRCRAFT SALES	§	CASE NO.
INC., a Texas Corporation,	§	391-30496-SAF-11
	§	
DEBTOR	§	
	§	
FAYSOUND LIMITED,	§	
	§	
PETITIONER	§	
	§	
V.	§	
	§	
WALTER FULLER AIRCRAFT SALES INC.,	§	
	§	
RESPONDENT	§	

AGREED ORDER

Now before the Court is the Joint Motion for Relief from Automatic Stay filed by Faysound Limited ("Faysound") and Walter Fuller Aircraft Sales, Inc. and from the Joint Motion, agreement of the parties and all other matters before the Court, the Court finds:

1. Faysound commenced an action against Walter Fuller Aircraft Sales, Inc. ("Debtor") and others in the United States District Court, Eastern District of Arkansas, Western

Division, Case No. LR-C-89-834 ("Pending Litigation") on October 9, 1989. The action involves the judicial determination as to the title/ownership of a 1982 Dassault-Brequet Falcon 50 Aircraft. Judgment was entered in the Pending Litigation on October 29, 1990. The Debtor filed a Notice of Appeal on November 7, 1990.

2. The Debtor filed a Voluntary Bankruptcy Petition on January 25, 1991.

3. The parties have agreed to the modification of the automatic stay, if applicable, for the limited purpose of allowing the appeal of the Pending Litigation.

NOW, THEREFORE, based upon the agreement of the parties, and good cause appearing to enter this Agreed Order in accordance with the parties' agreement, prior notice and opportunity for a hearing being unnecessary under the circumstances, the automatic stay of 11 U.S.C. §362 is hereby modified for the limited purposes of allowing the appeal of the Pending Litigation.

IT IS SO ORDERED.

DATED this ___ day of MAR 12 1991, 1991.

/s/ Illegible
UNITED STATES
BANKRUPTCY JUDGE

APPROVED AS TO FORM AND AGREED:

(This agreement may be executed on separate signature pages.)

GOODWIN, CARLTON & MAXWELL

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ATTORNEYS FOR FAYSOUND LIMITED

EXHIBIT B

03/13/91 0752-1612-2

REFERENCES	COMPANY	TRACKING #
[ ]-0002 MJ	EIGHTH CIRCUIT CT	6253186685

SVC	WGT	NET	CHG	DEPT CODE
PL	1		9.50	3886

SUBTOTALS FOR 10308-0002 MJ	
PACKAGE COUNT	1
PACKAGE CHARGES	15.50
DISCOUNTS RECEIVED	6.00
SPECIAL FEES	0.00
DEC. VAL. CHARGES	0.00
TOTAL CHARGES	9.50
TOTAL WEIGHT	1

03/13/91 0752-1612-2 TRACING REPORT SHIP0422 Page1

COMPANY	NAME	TRACKING #	SVC
EIGHT CIRCUIT CT	R ST VRAIN	6253186685	PL

DEPT CODE	CITY	ST	ZIP	SAT DEL ADDRESS
3886	ST LOUIS	MO	63101	US CT & CUSTOM HSE

GRAND TOTALS INVOICE - 913360571
PACKAGE COUNT
PACKAGE CHARGES
DISCOUNTS RECEIVED
SPECIAL FEES
DEC. VAL. CHARGES
TOTAL CHARGES
TOTAL WEIGHT

EXHIBIT 'B'

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
ARKANSAS WESTERN DIVISION

FAYSOUND LIMITED,

Plaintiff,

v. LR-C-89-934

WALTER FULLER AIRCRAFT
SALES, INC. and
FALCON JET CORPORATION,

Defendants.

MOTION AND BRIEF PURSUANT TO FED. R. CIV. P. 60(b) OF DEFENDANT WALTER FULLER AIRCRAFT SALES, INC.

Defendant Walter Fuller Aircraft Sales, Inc. ("Fuller") respectfully requests the court grant relief pursuant to Fed. R. Civ. P. 60(b) to the limited extent requested below, and respectfully shows the Court the following:

1. Fed. R. Civ. P. 60(b)(1) and (6) provide that the Court may relieve a party from a final judgment, order or proceeding for mistake, inadvertence, surprise, or excusable neglect, or any other reason justifying relief from the operation of the judgment. The Rule provides that the motion be made within a reasonable time and not more than one year after the judgment, order, or proceeding from which relief is sought was entered or taken under subparagraph 1.

2. The order from which Fuller seeks relief is the order signed by the Honorable Henry Woods, Judge of this Court, on January 18, 1991 and apparently docketed in this action on January 22, 1991 (the "January Order"). Fuller received notice of the entry of the January Order for the first time on May 16, 1991, only upon receiving a copy of a motion to dismiss the appeal of this action (No. 90-2896 in the United States Court Appeals for the Eighth Judicial Circuit) referencing the January Order, filed by plaintiff Faysound Limited in the appellate court. That motion contends Fuller did not properly invoke appellate jurisdiction in its November 7, 1990 notice of appeal. As will be shown in Fuller's response to that motion to be filed by May 28, 1991 in the appellate court, Faysound's motion is wrong in contending that appellate court jurisdiction was not invoked.

3. This Motion and Brief Pursuant to Fed. R. Civ. P. 60(b) ("Motion") is filed only seven calendar days after Fuller received notice of the January 22, 1991 entry of the January Order. This Motion is made only four months after the January Order was entered on the docket.

4. The evidence before the Court, as shown in the attached affidavits of Frederick S. Ursery, counsel to Fuller, and David Couch, counsel to Falcon Jet Corporation, establishes that Fuller never received notice of entry of the January Order and that no party to this action received notice of entry of a subsequent order by this Court in April 1991. It is apparent that, for reasons unknown to the parties, there are errors in the docketing of orders in this action beginning with January 1991, and in fact parties were not receiving the notice required by Rule 77(d).

5. Fuller maintains that its notice of appeal filed November 7, 1990 properly invoked appellate court jurisdiction. Fuller further maintains that subsequent filings with the Eighth Circuit again provided all information required by Fed. R. App. P. 3(c) in a timely manner in accordance with applicable law and in light of Fuller's bankruptcy filing. The relief requested by this Motion is therefore limited: Fuller requests only that the Court deem entry of the January Order to be as of May 16, 1991. Thus, if Fuller's notice of appeal filed November 7, 1990 and subsequent filings in the appeal of this action, which provided all information required by Fed. R. App. P. 3(c), were not effective, Fuller may again notice its appeal in this action. This request is made as the result of apparent errors by the office of the district clerk of this Court. Fuller, Defendant in this Court, hereby gives notice as Appellant, of appeal from the Judgment in the above-styled and numbered cause of this Court dated October 29, 1990 vesting title to the Falcon 50 in Plaintiff Faysound Limited, as Appellee, to the United States Court of Appeals for the Eighth Circuit.

6. This is not a case where a party has failed diligently to pursue its rights. *See L.Z. v. Parrish*, 733 F.2d 585 (8th Cir. 1984) (where parties had "clear notice" of court's decision, failure to receive judgment did not relieve parties from exercising diligence). Rather, Fuller, after notice of the October 29, 1990 decision, filed a timely notice of appeal and subsequently diligently pursued its rights in the Eighth Circuit. On January 14, 1991, Fuller filled the parties' joint appendix on appeal, which included a copy of the docket sheet it obtained from the district clerk "as of January 7, 1991." That docket sheet had no entry

relative to the January Order. In this case "a wooden reading of Rule 77(c) [and Rule 60(b)] would thwart rather than promote the ends of justice." *Buckeye Cellulose Corp. v. Braggs Elec. Construction*, 569 F.2d 1036 (8th Cir. 1977) (reversing district court's denial of uncontested Rule 60(b)(6) motion with directions to vacate and re-enter judgment preserving right to appeal).

7. It is clear from the revisions to Fed. R. App. P. 4(a) and Fed. R. Civ. P. 77(d), both of which were amended this year by the Supreme Court (*see* 59 U.S.L.W. 4355 and 4359), that the Supreme Court recognizes that errors do occur in notifications from the district clerks' offices in the federal courts; it is the policy enunciated by the Supreme Court that parties who do not receive notice, without regard to whether a docket sheet states that notice was mailed, be granted relief so that an appeal right is not lost due to clerical errors.

8. Fuller's request is limited and granting the relief would be just. Neither Falcon Jet nor Faysound noticed appeal from the January Order and thus have accepted it as final. The substance of the ruling in the January Order is not and will not be the subject of the appeal. Moreover, Faysound fully briefed the dispute between Fuller and Faysound, which is all that is on appeal, to the Eighth Circuit and will not be treated unjustly by granting this relief. Indeed, the Eighth Circuit appeal is currently set for argument on June 13 and all briefs, motions, and other papers to the Eighth Circuit have been filed, with the exception of Fuller's response to Faysound's motion to dismiss the appeal, which will be filed by Fuller tomorrow (a copy of which will be filed with this Court as

well). Thus, there is no injustice in granting the relief requested by Fuller in this Motion.

WHEREFORE, Defendant Walter Fuller Aircraft Sales, Inc. respectfully requests the Court grant it the limited relief requested above pursuant to Fed. R. Civ. P. 60(b), and grant it such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

FREDERICK S. URSERY
Bar No. 67055
DIANE S. MACKEY
Bar No. 78101

FRIDAY, ELDREDGE & CLARK
2000 First Commercial Bldg.
Little Rock, AR 72201
(501) 376-2011

COUNSEL FOR DEFENDANT
WALTER FULLER AIRCRAFT
SALES, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by hand delivery on David Couch, counsel to Falcon Jet Corporation, and Vince Foster, counsel to Faysound Limited, on this 23 day of May, 1991.

Supreme Court, U.S.
FILED
JAN 21 1992
OFFICE OF THE CLERK

(2)

No. 91-1039

In The

Supreme Court of the United States

October Term, 1991

Walter Fuller Aircraft Sales, Inc.,

Petitioner,

versus

Faysound Limited,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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No. 91-1039

In The

Supreme Court of the United States

October Term, 1991

Walter Fuller Aircraft Sales, Inc.,

Petitioner,

versus

Faysound Limited,[1]

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

INTRODUCTION

Respondent will show that Petitioner's proposed questions are seriously misstated and misleading; that there is no basis for the claim of conflicts in the Circuits; that the judgment below was in complete accord with the precepts of this Court; that the *Forgay* doctrine has no application to the judgment of the district court or to the question of procedure presented on appeal; and that there is no reason to find error or abuse on the part of the

[1] The parties are as identified by Petitioner. Respondent Faysound Limited has no subsidiaries and is owned by Longreach Business, S.A.

Court of Appeals in following the rules in force at the time of its judgment.

PETITIONER MISSTATES THE QUESTIONS

1. Petitioner's first question charges the Court of Appeals with an erroneous holding as to the proper content of a "notice of appeal" and is a serious misstatement intended to create the impression of a question and conflict where there is none. The Court was not referring to a proper notice of appeal, but to other documents that Petitioner urged the Court to recognize in place of it. The Court's statement was by no means a holding and, if exceptionable, no more than an inadequate expression of one of the reasons for a well-founded conclusion. There is no basis for the pretense that the Court of Appeals does not agree with Fed. R. App. P. 3(c) on the content of an actual notice of appeal.

2. A clearer and more forthright statement of Petitioner's second question would be:

> 2. Does Fed. R. App. P. 4(a)(6), effective December 1, 1991, authorizing certain relief by a district court to a party not receiving timely notice of an order, upon timely application, warrant reversal of a court of appeals judgment entered August 1, 1991, in accordance with the rules then in force?

3. Petitioner's third question should more accurately be bifurcated and stated:

> 3. a. Is a district court's declaratory judgment of title to property, without ordering a

transfer of possession or other execution, and pending decision of a motion to amend, within the doctrine of *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848); and

b. If the judgment fell within the doctrine of the *Forgay* case, would an appeal be subject to the Federal Rules of Appellate Procedure?

COUNTER-STATEMENT OF THE CASE

We restate the case because the relevant proceedings can be more simply and clearly stated than they are in the Petition.

Respondent brought suit against Petitioner for a declaratory judgment of Respondent's title to an airplane. Throughout the litigation, the airplane in contest has been, as it remains, in the hands of Falcon Jet Corporation, not a party here but a defendant below, which, in the course of proceedings, tendered the airplane by cross-claim in interpleader. Falcon Jet also claimed a lien on it for storage charges under Ark. Code Ann. § 18-45-201. The district court entered a judgment October 29, 1990, declaring that the disputed title to the airplane lay with Faysound, and denied defendant Falcon Jet's claim of a lien for storage. By virtue of Fed. R. Civ. P. 62, the judgment was not final, but was stayed for ten days, during which motions could be made under Rule 59(e) to amend it and turn it into a different, and contrary, judgment.

On November 7, 1990, however, Petitioner filed its notice of appeal. Two days later, Falcon Jet filed a timely motion, under Fed. R. Civ. P. 59(e), to amend the judgment by granting it the lien interest it claimed. Petitioner received notice of the motion and opposed it (Pet. 3) and was therefore charged with knowledge that its notice of appeal was nullified, under Fed. R. App. P. 4(a)(4). Another effect of the motion, raising as it did a claim of a security interest in the property, was to deprive the judgment of its finality, not only by definition of possible amendment but by the reassertion of conflicting claims of interest in the airplane.

On January 22, 1991, an order was entered denying the motion to amend and, under the Rules, the judgment again became final and appeal time started to run. Petitioner claims not to have received timely notice of the entry of the order. It makes no claim, however, to have performed any act relevant to the time for appeal and received "assurance by a judicial officer that this act has been properly done," so as to activate the rule of "unique circumstances."[2] Petitioner gave no new notice of appeal but treated the original notice as valid, by continued activity in the Court of Appeals.

Respondent moved to dismiss the appeal for lack of jurisdiction. In reply, in addition to points not renewed here,[3] Petitioner argued that:

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[2] *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989).

[3] Petitioner contended in the Court of Appeals that the judgment below had been a form of injunction and therefore

(Continued on following page)

1. because Fed.R. App. P. 4(a)(1) provides that a "notice of appeal mistakenly filed in the court of appeals" should be endorsed with the date of its receipt and transmitted to the clerk of the district court, where it has effect as from the endorsed date, various other papers Petitioner filed in the Court of Appeals within the appeal period should have been treated as a valid notice of appeal;

2. its notice of appeal remained valid under the doctrine of *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848), despite Rule 4(a)(4); and

3. the amendment of Fed. R. App. P. 4(a)(6), expected to come into force six months later (barring Congressional abrogation) and permitting relief to be granted by the district court, should be applied by the Court of Appeals, in conjunction with Fed. R. Civ. P. 60(a) providing for correction of clerical errors.

These arguments were held inadequate, as stated in the opinion below (Pet. App. 1).

(Continued from previous page)

the notice of appeal remained valid despite Rule 4(a)(4) and that the case presented "unique circumstances," under the doctrine of *Thompson v. INS*, 375 U.S. 384 (1964) and *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989).

THERE IS NO CONFLICT OF CIRCUITS

Content of a Notice of Appeal

No doubt the Court of Appeals would have been in conflict with the Federal Rules of Appellate Procedure and decisions of this Court and others, if it had held that a real notice of appeal should designate an order on a post-judgment motion with which the appellant agreed, rather than the judgment itself, with which the appellant disagreed. But the Court of Appeals did not so hold.

There is no evidence that the Court of Appeals for the Eighth Circuit is in conflict with others on the contents of an actual notice of appeal under Fed. R. App. P. 3(c). Its true understanding is shown by its own decisions on that point, cited by Petitioner itself (Pet. 13, n. 5). And, whether or not this Court accepts the characterization, "uncompromising rigidity," quoted by Petitioner, the Court of Appeals has invented no new rule and applied none more stringent than those laid down in the Federal Rules of Appellate Procedure and the decisions of this Court.

In the words Petitioner challenges here, the Court of Appeals was addressing the problem of recognizing that a letter filed with the Court of Appeals, not entitled "notice of appeal," was intended as one, and dealing with it accordingly under the Rules. The Court stated, with perhaps excessive elision, one of its reasons for not treating such a letter as a "notice of appeal mistakenly filed in the court of appeals," which its clerk would be required to recognize as such and "note thereon the date on which it was received and transmit it to the clerk of the district court," in accordance with Fed. R. App. P. 4(a)(1). The

Court presumably had in mind that, where a notice was already of record and an appeal docketed, there was no reason for its clerk to suppose that the letter, not entitled "notice of appeal," represented such a notice, without some reference to the district court's post-judgment order (Pet. App. 38) as evidence of the need for a new notice.

The Court, farther on, clearly elaborated the point to which it had alluded. It properly rejected the notion that it had to "search through various documents in our Clerk's office, including even a letter from Fuller's counsel informing us of the lifting of a bankruptcy stay, in order to piece together the various constituent elements necessary to a proper notice of appeal" (Pet. App. 7). In such a search the clerk would have to find a post-judgment motion nullifying the original notice, and also the order deciding that motion, and discover that afterwards papers were filed that were of possible special significance because of the nullification of the actual notice. The clerk would then have to determine that those papers contained the elements of a notice of appeal and should be treated as though they constituted such a notice "mistakenly filed in the court of appeals," despite the fact that they were not entitled "notice of appeal" and were not mistakenly filed, since there was an obvious other purpose in filing them in the court of appeals.

The only sensible meaning of Fed. R. App. P. 4(a)(1) is that the document filed must be a genuine notice of appeal, so entitled, and not a document intended for another purpose in the court of appeals. Otherwise its filing there would not be mistaken and the clerk would have no inkling of his duty to transmit it to the district

court, since he would properly assume it to belong in the court of appeals, as it appeared and was in fact intended. Thus, even if a document not entitled as a notice of appeal and not in the form prescribed may possibly be treated as a notice of appeal when filed in the district court, it by no means follows that such a misleading document can be given the same effect when filed in the court of appeals, where the clerk cannot be expected to recognize the hidden significance to be given it in later argument.[4]

Petitioner relies on its counsel's letter of March 13, 1991 to the clerk of the Court of Appeals, forwarding an agreed order of the bankruptcy court. The letter (Pet. App. 47) does not contain the elements of a notice of appeal. The order itself (Pet. App. 48) refers only to the premature and invalid notice of appeal of November 7, 1990 and identifies nothing more than the continuation of the invalid proceedings to which that notice gave rise.

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[4] *See Van Wyk El Paso Investment, Inc. v. Dollar-Rent-A-Car Systems, Inc.*, 719 F.2d 806, 808 (5th Cir. 1983), where the court rejected a form of appearance of counsel and several communications with the clerk as the equivalent of a notice of appeal and said:

> We clearly cannot characterize memoranda and correspondence of the Court, which connote no more than normal developments in the course of processing a premature appeal, as the equivalent of a timely notice of appeal.

See also Alamo Chemical Transportation Co. v. M/V Overseas Valdes, 744 F.2d 22, 23 (5th Cir. 1984); *Florida Women's Medical Clinic, Inc. v. Smith*, 706 F.2d 1172 (11th Cir. 1983).

Nothing in *Foman v. Davis*, 371 U.S. 178 (1962) or *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) or *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. ___, 112 L.ed.2d 743 (1991) is in the least inconsistent with the judgment of the Court of Appeals here. In *FirsTier Mortgage*, the appellant received the benefit of a necessary interpretation of Fed. R. App. P. 4(a)(2); but the sentence of Rule 4(a)(4) involved here needs no interpretation and is susceptible of none favorable to Petitioner. The decision of the Court of Appeals is in full harmony with the decisions of this Court on notices of appeal.

The *Forgay* Decision

There are two fundamental errors in Petitioner's reliance on *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848). The case does not apply to the judgment here and does not deal with the rules of appellate procedure.

Forgay and its progeny have nothing to do with the issue here; their doctrine is one of the tests used to determine what judgments are final and appealable, where collateral issues are pending. *Forgay* itself is clear that the reason the judgment was appealable, notwithstanding the pendency of other issues, was that, "here the decree not only decides the title . . . but directs the property in dispute to be delivered to the complainant, and awards execution." 47 U.S. (6 How.) at 204.

Petitioner's own discussion (Pet. 25-26) of *In re Regency Woods Apartments, Ltd.*, 686 F.2d 899 (11th Cir. 1982), the case alleged to be in conflict, makes clear that the case completely agrees with the decision here and

with *Forgay*. The court there denied the application of *Forgay* and said that it would only apply if the court had ordered the delivery of the property[5] (at 902). With the hesitant signal, "*see also*," Petitioner also cites *Kasishke v. Baker*, 144 F.2d 384 (10th Cir. 1944); that case likewise presents no conflict, since the decree there operated as a conveyance of property on failure of the defendant to promptly execute one.

Petitioner draws the red herring of supersedeas through this topic.[6] The Court of Appeals expressly disavowed any significance to the availability of supersedeas (Pet. App. 9) and so it has nothing to do with the issue here beyond the attempt to create the illusion of conflict.

There is no doubt here that the district court's judgment would have been final and appealable if not amended, and, under Fed. R. Civ. P. 62, would have become enforceable after ten days, by appropriate proceedings, if no motion were made in that time.[7] If the

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[5] "Under the *Forgay-Conrad* rule an order is treated as final if it directs the immediate delivery of the physical property and subjects the losing party to irreparable injury if appellate review must await the outcome of the litigation."

[6] Supersedeas does not determine appealability but presupposes an appealable judgment. The rules do not provide a special or built-in stay for a *Forgay* judgment and so supersedeas is needed, and serves the same purpose, with such a judgment as with any other.

[7] *See United States v. Ibarra*, 502 U.S. ___, 116 L.ed.2d 1, 7 (1991): "[A] motion for rehearing in a criminal case, like a motion for rehearing in a civil case, renders an otherwise final decision of a district court not final until it decides the petition for rehearing."

motion to amend the judgment had been granted, the result would have been to impose a lien on the airplane, and the judgment would then have been final and appealable, in that case by Respondent as well as Petitioner. Because the motion dealt with rights in the property, it made the judgment unenforceable for practical reasons of substance as well as procedure. Since the motion was denied, the original judgment was a final judgment, subject to appeal from the date of the denial.

Petitioner's problem here does not arise from any question of the appealability of the judgment, but from the effect of the present rules, which did not exist in the days of *Forgay* and are not involved in the issue with which *Forgay* deals. Fed. R. App. P. 4(a)(4) makes no exception for judgments subject to the *Forgay* doctrine; accordingly, a motion under Fed. R. Civ. P. 59(e) interrupts the finality and appealability of such judgments. Fed. R. Civ. P. 77 also applies fully to such judgments. Nothing in the cases Petitioner cites suggests the contrary.

Accordingly, no crisis was presented with respect to transfer or possession of the property and the *Forgay* Doctrine does not apply here. And where *Forgay* does apply, it does not dispense the appellant from following the rules creating jurisdiction on appeal. The claim of a conflict in the circuits is false and can not be jacked up even to the dignity of speciousness.

IT IS NOT THE ROLE OF THIS COURT TO REVERSE OLD JUDGMENTS TO CONFORM TO NEW PROCEDURAL RULES

As of December 1, 1991, Fed. R. App. P. 4(a)(6) was amended to give a district court authority to reopen the time for a notice of appeal, on application within 180 days of the entry of the order to be appealed from, by a party who did not receive notice of its entry.

When this case came to the attention of the Court of Appeals, the district court had not taken or omitted any action under Rule 4, either as it stood at that time or as it was expected to be amended more than half a year later. The Court of Appeals therefore was not confronted with any question of error or abuse by the district court. Petitioner nevertheless asked the Court of Appeals, to whose proceedings the proposed amendment would not apply in any event, to rule in its favor on the basis of the proposed amendment. The Court was constrained to decide the case on the basis of the rules applicable to itself and in force at the time of decision. Had the amended rule been in effect and had the district court denied relief under it, the situation might have been different.

Petitioner now argues, on the ground that the amendment is now in effect, that this Court, a further step removed, should consider reversing a decision of the Court of Appeals, based on an hypothesis of what the district court might have done if it had received a motion it did not receive, under a rule not in effect when the case was before it, and still months away when the case was before the Court of Appeals.

We respectfully submit that it is not the function of this Court, on certiorari (Rule 10), or in any of its jurisdictions, to patch up old procedural errors of parties, by indulging in suppositions under the terms of rules not in effect when the parties and the courts below took their relevant actions. The courts below have not erred in following the rules by which they were governed at the time and the function of this Court to provide guidance for the future would not be advanced; the Rules have already done that.

CONCLUSION

The issues raised by Petitioner do not warrant hearing by this Court. The suggestion of Petitioner that the Court summarily reverse the judgment below is especially inappropriate; it is a plea that the Court make a capricious ruling, without the support of a citable case of this Court to support a charge of error or abuse by the Court of Appeals or to indicate what, and on what grounds, that Court should do, other than it has done.

The Petition should be denied.

Respectfully submitted,

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(3)

No. 91-1039

In The
Supreme Court of the United States
October Term, 1991

WALTER FULLER AIRCRAFT SALES, INC.,

Petitioner,

versus

FAYSOUND LIMITED,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner Walter Fuller Aircraft Sales, Inc. ("Fuller") files this Supplemental Brief to its Petition for a Writ of Certiorari pursuant to Supreme Court Rule 15.7.[1]

1. On January 14, 1992 this Court entered a decision in *Smith v. Barry*, _____ U.S. _____, 60 U.S.L.W. 4065 (1992). In *Barry*, this Court stated that the notice afforded by a document, not the litigant's motivation in filing it, determines a document's sufficiency as a notice of appeal. *Barry*, 60 U.S.L.W. 4067. Consequently, in *Barry*, this Court held that an informal appellate brief, filed in the Court of Appeals, could serve as a proper notice of appeal. *Id.*

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[1] Petitioner Walter Fuller Aircraft Sales, Inc. is neither a parent nor a subsidiary corporation.

2. *Faysound Limited v. Falcon Jet Corporation*, 940 F.2d 339 (8th Cir. 1991), the decision sought to be reviewed in Fuller's petition, involves the sufficiency, as a notice of appeal, of papers filed by the petitioner Fuller. *Barry* directly speaks to a number of the specific issues raised in Fuller's petition for a writ of certiorari, further supports the petition, and entirely negates the Respondent's central position in its Brief in Opposition to the petition asserting that "the only sensible meaning of Fed. R. App. P. 4(a)(1) is that the document filed must be a genuine notice of appeal, so entitled, and not a document intended for another purpose in the court of appeals." Respondent's Brief in Opposition, p. 7.

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

Respondent FAYSOUND LIMITED submits this supplemental brief in opposition, pursuant to Supreme Court Rule 15.7.

On January 14, 1992, this Court decided *Smith v. Barry*, ___ U.S. ___, 60 U.S.L.W. 4065 (1992), concerning the adequacy of a document filed in the Court of appeals to serve as a notice of appeal. *Smith v. Barry* does not control this case, as Petitioner contends, and is significantly different.

In *Smith*, the Court of Appeals held that a brief could not serve as a notice of appeal. In sharp contrast to this case, the Court of Appeals there sent out to a prisoner

acting *in pro per* a questionnaire it sends to such appellants and styles an "informal brief". It was returned within the time for appeal. It was to be seriously reviewed by the court, in contrast to Petitioner's letter and enclosure in question here, which had only to do with schedule and referred to expected notice from Respondent. That case involves action by the court, giving "assurance by a judicial officer" that an appeal has been properly taken, and is clearly within the rule of "unique circumstances", under *Thompson v. INS*, 375 U.S. 384 (1964) and *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989).

In *Smith*, the Court of appeals did not go forward to analyze the information the brief conveyed, as it must now do on remand. Here, the Court went forward and reviewed the letter and enclosure and determined that they were not adequate to alert the court to their being the "functional equivalent" of a notice of appeal.

The court here did not take the position that the documents filed must be entitled "notice of appeal" and that position is not "central," or even involved, in its decision.

Respectfully submitted,

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REPLY BRIEF

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REPLY BRIEF

Petitioner Walter Fuller Aircraft Sales, Inc. files this Reply Brief pursuant to Supreme Court Rule 15.6.

1. In its Brief in Opposition to the Petition for a Writ of Certiorari, Respondent has admitted that the Eighth Circuit

> would have been in conflict with the Federal Rules of Appellate Procedure and decisions of this Court . . . if it had held that a real notice of appeal should designate an order on a post judgment motion with which the appellant agreed, rather

> than the judgment itself, with which the appellant disagreed.

Respondent's Brief in Opposition at 6 (emphasis added). However, this is exactly what the Eighth Circuit found. According to the Eighth Circuit,

> Looking past the fact that Fuller's supposed notices were filed in the wrong court, and reading those papers generously, Fuller's pleadings are still insufficient: they do not specify correctly the judgment being appealed from. All the various documents specify instead the District Court's October order, the original judgment, and not the final judgment entered on January 22, 1991, with the denial of Falcon Jet's post judgment motion.

Faysound Ltd. v. Falcon Jet Corp., 940 F.2d 339, 342 (8th Cir. 1991) (emphasis added). This finding is in error and must be corrected.

2. Respondent maintains that the basis for the Eighth Circuit's holding in the decision to be reviewed above was that

> [t]he only sensible meaning of Fed. R. App. P. 4(a)(1) is that the document filed must be a genuine notice of appeal, so entitled, and not a document intended for another purpose in the court of appeals.

Respondent's Brief in Opposition, p. 7. To the contrary, as this Court recently stated, it is the notice afforded by a document, not the document's title or the litigant's motivation in filing it, which determines a document's sufficiency as a notice of appeal. *Smith v. Barry*, ___ U.S. ___, 60 U.S.L.W. 4065, 4067 (1992).

3. Respondent, in its Supplemental Brief, has attempted to distinguish the *Barry* decision as a "unique circumstances" case. This assertion is erroneous; the *Barry* decision does not rely on "unique circumstances" and stands completely outside the doctrine.

In *Barry*, this Court held that an informally filed brief could be a proper notice of appeal. In contrast, the doctrine of "unique circumstances" is found "only where a party has performed an act, which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that the act has been properly done." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989)(emphasis added). Thus, the "unique circumstances" doctrine is a judicially created exception to the Federal Rules of Appellate Procedure. However, the *Barry* decision did not rely on an exception to the Rules; rather, this Court found that the appellant had met the requirements of the Rules themselves and had filed his appeal within the correct deadline. *Barry*, 60 U.S.L.W. at 4067.

Faysound's argument to the effect that Petitioner's papers did not constitute a "real notice of appeal" is contrary to this Court's holding in *Smith v. Barry*.

CONCLUSION

Petitioner urges that its petition be granted and that this case be reversed for the reasons stated herein and in the Petition for a Writ of Certiorari.

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